Petition

Supreme Court, U.S.
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No. 81-1707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARLIE GLEN SKELTON, JR., et al.,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

1. Whether the majority in the Seventh Circuit's opinion correctly determined that a "written warranty" actionable by a private consumer against a supplier under the Magnuson-Moss Warranty Act, 15 U.S.C. §§2301 et seq., does not include specific written representations of substance about the product made in connection with the sale of the product.

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In The

Supreme Court of the United States

October Term, 1981

ARLIE GLEN SKELTON, JR., et al.,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS RENDERED IN THE ABOVE-ENTITLED ACTION.

Citations To The Opinions Below

The above-entitled case was originally brought in the United States District Court for the Northern District of Illinois. The District Court's memorandum opinion and order, dated October 1, 1980, denying defendant's motion to dismiss as to Count I and granting defendant's motion to dismiss to Count II is reported at 500 F. Supp. 1181. Defendant's interlocutory appeal from the District Court's refusal to dismiss as to Count I was certified, pursuant to 28 U.S.C. §1292(b), by the District Court on October 31, 1980, and accepted by the United States Court of

Appeals for the Seventh Circuit on December 4, 1980. The decision of the United States Court of Appeals for the Seventh Circuit is reported at 660 F.2d 311. Plaintiffs' Petition for Rehearing en banc was denied on December 11, 1981, and was unreported. The District Court's opinion is included in the Appendix to this Petition (App. 27), as is the Seventh Circuit's opinion (App. 1).

JURISDICTIONAL STATEMENT

The divided (2-1) decision of the Circuit Court of Appeals was rendered in an opinion reported at 660 F.2d 311 and entered on September 28, 1981. A timely petition for rehearing en banc was filed and was denied on December 11, 1981. This Petition for Writ of Certiorari was filed within ninety days of the denial of

rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

All the statutes involved in this petition are sections of the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, 15 U.S.C. §§2301, et seq. (1975). The pertinent sections of the Magnuson-Moss Act read as follows:

> §2301. Definitions
>
> For the purposes of this title:
>
> . . . .
>
> (6) The term "written warranty" means-
>
> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes a part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

. . . .

§2302. Warranty provisions.

(a) Rules requiring full and conspicuous disclosure; contents of written warranty. In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the warranty shall fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty- at whose expense-and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure

offered by the warrantor and a recital where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

. . . .

§2303. Designation of Warranties.

. . . .

(b) Exemption for expressions of general policy regarding customer satisfaction. Sections 102, 103, and 104 [15 USCS §§2302, 2303 and 2304] shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations.

. . . .

§2310. Remedies

. . . .

(c) Jurisdiction of District Courts; actions by Attorney General or by Commission; "deceptive warranty"

(1). . . .

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty

not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty" if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d) Suits by consumers; class actions.

(1) Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title [15 USCS §§2301 et seq.] or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief--

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in the appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in an action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (in-

cluding attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection-

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interest and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

. . . .

STATEMENT OF THE ISSUE

Plaintiffs, purchasers of automobiles manufactured by defendant General Motors Corporation (hereinafter "GM"), brought this action as a nationwide class action on behalf of all purchasers of GM automobiles containing THM 200 transmissions manufactured from 1976 through 1979. As summarized by the District Court, plaintiffs' Second Amended Complaint alleges that:

> . . .GM has disseminated "brochures, manuals, consumer advertising and other forms of communications" which "expressly represented and warranted" that certain GM automobiles contained "THM 350. . . transmissions, or transmissions of similar quality and performance . . . and that they would meet a specified level of performance." Through such communications, GM "implied, warranted and represented" that those models contained such transmissions. 500 F. Supp. 1181, 1183.

Plaintiffs charge in Count I that, contrary to these warranties and representations, GM

substituted and installed inferior THM 200 (M29) transmissions for THM 350 (M38) transmissions in GM automobiles manufactured from 1976 through 1979. This undisclosed substitution is alleged to constitute a violation of written warranties under §110 (d) of the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act (hereinafter "Magnuson-Moss" or the "Act"), 15 U.S.C., §2310(d)(1) (1975). Jurisdiction of this case in the United States District Court for the Northern District of Illinois was based upon 15 U.S.C., §2310(d)(1)(B), 28 U.S.C. §1337, 28 U.S.C. §2201 and §2202.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This petition involves a case of first impression raising an issue of national significance, that is, the interpretation of the Magnuson-Moss Warranty-Federal Trade

Commission Improvement Act, 15 U.S.C. §§2301, et seq. (1975).

On January 4, 1975, Public Law 93-367, Title I of the Magnuson-Moss Consumer Product Warranties Act became law. This significant milestone in the rights of American consumers represented in its final form the distillation of eight years of investigation, hearings, debates, and reports by two Presidential Commissions, the Federal Trade Commission, and three Committees of Congress. These deliberations, which comprise, the "legislative history" by which the meaning of the Act itself must be interpreted, are open public record.*

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*Four studies of the problems consumers were having with warranties were conducted prior to the Act's adoption. In 1965, the FTC instructed its staff to conduct a field investigation to study the extent of compliance of automobile manufacturers with their written warranties. In October, 1968, the staff issued the results

*footnote continued

of its study, concluding that "(p)erformance of manufacturers and dealers under the warranty has not achieved the levels implied by the warranty," and "(f)ailure to perform up to warranted standards has been encountered." FTC, STAFF REPORT ON AUTOMOBILE WARRANTIES 196 (1968), reprinted in part in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7708 (hereinafter the Presidential Task Force on Appliance Warranties and Service issued the results of a study conducted on household appliance warranties, which revealed that the manufacturers of household products did not provide clear and explicit warranties and that they often failed to honor their warranty obligations. TASK FORCE ON APPLIANCE WARRANTIES AND SERVICE, REPORT ON APPLIANCE WARRANTIES AND SERVICE 100-80 (1969) (prepared by the FTC, Dep't. of Commerce, Dep't. of Labor, and Special Assistant to the President for Consumer Affairs), reprinted in part in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7709-10. The FTC itself then issued a report on automobile warranties proposing the enactment of federal legislation that would establish "minimum standards of quality, durability, and performance of new automobiles," and that would require manufacturers to repair defective automobiles free of charge. FTC, STAFF REPORT ON AUTOMOBILE WARRANTIES 125-26 (1970), reprinted in part [1974] U.S. CODE CONG. & AD. NEWS 7702, 7709 ("FTC REPORT"). Finally, in 1974, the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce issued the results of a fourth survey -- a followup study to the 1968 FTC staff report and the 1969 Task Force report. In general, the Subcommittee

Briefly summarized, the history of the Act shows that automobile warranties were one of the first and most important direct areas of concern of both the Administration and the Congress. It is little wonder that this is so. Congressional reports took note that by 1974 new car sales grossed more than $90 billion dollars. Of this immense area of consumer sales, the FTC had found that approximately 33% of new cars were delivered in unsatisfactory condition, that 9% of owners reported that their cars were mechanically unreliable, and that between Septem-

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*footnote continued

concluded that few changes had occurred in the substance of consumer product warranties since the two earlier reports, and that the problems described by the prior studies had persisted. STAFF OF SUBCOMM. ON COMMERCE & FINANCE OF THE HOUSE COMM. ON INTERSTATE ANF OREIGN COMMERCE, 93D CONG. 2D SESS., REPORT ON CONSUMER PRODUCT WARRANTIES 20 (Comm. Print. 1974), reprinted in 120 CONG. REC. 31321 (1974) ("House Staff Report"). Numerous bills were then introduced in both the House and Senate over the next four years to cure this serious problem.

ber, 1966 and January, 1968 alone there were 4.5 million recalls. FTC Staff Report, supra, n.1; FTC Report, supra, n.1.

Congress and the Administration found that the inadequacies of new car warranties were directly related to the unsatisfactory quality of new cars received by consumers. The FTC found that the manufacturers merely saw the warranty as a marketing device to promote sales - not as an effective remedy for defective products. See, C. Smith, The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor, 13 Calif. W. L. Rev. 391, 392 (1977). As a result, the FTC further found that quality control was rapidly deteriorating, that automobile warranty and service were inadequate, and that manufacturers had no qualms telling consumers the auto was "defect free" when it was in fact far below that standard. A

graphic example of the inadequate warranty protection was General Motors' Chevrolet Division: when a large increase in warranty costs was noticed, management did not ask engineering to develop a more reliable product, instead they ordered dealers to cut back on warranty work. Brickley, The Magnuson-Moss Act - An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool, 18 Santa Clara L. Rev. 73, 76 (1978). Most significantly, several years after the FTC investigation, the Special Presidential Task Force found that despite the industry's full knowledge of the warranty problem, nothing had been done to help the many millions of consumers affected by defective cars. See generally, House Staff Report, supra, n. 1.

Congress and the Administration also found that the new car warranty problems

went beyond the failure to remedy defective products. It was found that the so-called "warranty" - the piece of paper with the "filigree border" - was actually a method of consumer deception. These "express warranties" simultaneously disclaimed all implied warranties under State law, resulting in a document which gave the consumer less protection than if there had been no "written warranty" at all. See Leete, A Look at the Consumer Warranty Problems - The Federal Solution, 6 U. of Toldeo L. Rev. 351, 353 (1975). Consumers were sold shoddy goods, and the "written warranty" helped to market them. Eddy, Effects of the Magnuson-Moss Act Upon Consumer Product Warranties, 55 N. Carolina L. Rev. 835, 849 (1977).

Other realities of the market place further illustrate the concern of Congress over the helpless condition of the average

consumer in the new car market. Product choice by the consumer is severely limited because of the highly concentrated, oligopolistic nature of the market. Moreover, even under relatively competitive conditions, sophisticated advertising and promotional techniques manipulate and distort consumer demand. Reich, Toward a New Consumer Protection, 128 U. of Pa. L. Rev. 1, 12-13, 24 (1979). The impact and lasting effect of such advertising have been recognized by the FTC and the courts for many years. See, e.g., In the Matter of Warner-Lambert, 86 FTC 1385 (1975), aff'd, 562 F.2d 749 (7th Cir. 1963), cert. denied, 375 U.S. 944, 998 (1963); In the Matter of Ocean Spray Cranberries, Inc., 80 FTC 975 (1972). The consumer cannot even adequately assess his risk because all the relevant information is possessed by the seller, and thus the monopolistic manufacturer can increase his

profits at will either by raising prices, or by reducing quality standards. Reich, supra, 128 U. of Pa. L. Rev. at 22, 24.

These fundamental changes in the relationship between "buyers" and "sellers" were noted in the Congressional debates on the final versions of the Act. As stated by Representative Herman Badillo on September 19, 1974:

> However, as our society became increasingly mobile, the concept of the well-known craftsman who stood behind his products was lost. When deciding among competitive products, consumers must increasingly depend upon the representations made by manufacturers' warranties and through advertising. Gradually, even the concept of the "purchaser" became eroded and was replaced with the "market" which was played, analyzed, created and often sharply exploited to produce the profits contributing to our high standard of living.
>
> As the quality of goods increased, quality often decreased and consumer satisfaction dropped.

120 CONG REC. 32013 (1974) [Emphasis added.]

The plight of the consumer has been long acknowledged. Perhaps the most appropriate illustration of the inequality between the consumer and the manufacturer is the definition of consumer found in Comment, Consumer Warranty Law in California, 26 U.C.L.A. L. Rev. 483, 585 (1979):

> Consumers-"people who are persuaded by persons whom they do not know to enter into contracts that they do not understand to purchase goods that they do not want with money that they have not got."

Thus, it has been widely recognized that even the most liberal application of the warranty terms under the UCC may not sufficiently protect consumers. Consumers do not have the expertise of "merchants;" they never have the opportunity to "negotiate" the warranty terms with the manufacturer, and they probably never see the

warranty at all until after they have driven the new car home and opened the glove compartment. Comment, Id., at 594; Note, Consumer Product Warranties Under the Magnuson-Moss Act and the Uniform Commercial Code, 62 Cornell L. Rev. (1977). Smith, supra, 13 Calif. W. L. Rev., at 392.

Several suggestions were made to the Congress to cure the problem of new car warranties which did not remedy such alarmingly defective products and which actually limited consumers' remedies under existing law. The FTC recommended that the situation was so bad, the only effective way to protect the consumer was the adoption of minimum federal quality standards. Several bills were introduced in the Senate proposing such mandatory quality standards, but they were never reported out of committee. S. 2727, 2728, 90th Cong., 1st Sess. (1967); See Brickly, supra, 18 Santa

Clara L. Rev., at 78-79

Between 1970 and 1974 more than twelve different bills were submitted in both the House and Senate to cure the serious problems discovered in the area of inadequate consumer protection from defective mass merchandise products. As discussed below, analysis of the legislative history reveals that the extent and nature of the protection given to consumers varied significantly from bill to bill until the final compromise version of the Amended S. 356 was reported out of the House and Senate Conference Committee on December 18, 1974. Conference Report No. 83-1408, 93d Cong., 2d Sess. (1974) reprinted in [1974] U.S. Code Cong. & Ad. News 7702, 7755. However, it is clear throughout all these proposals and modifications that Congress had adopted a consistent and unified plan to combat industry's disregard for the public's

right to meaningful consumer protection. The overriding intent of Congress was simple and direct: to require full disclosure of warranty terms and quality standards in simple and readily understood terms, and to prevent manufacturers from using a limited express warranty as a device to rob consumers of the warranty protection they would normally have under state law. (See Conference Report No. 93-1408, supra; H. R. Rep. No. 93-1107, 93d Cong., 2d Sess. (1974) reprinted in [1974] U.S. Code Cong. & Ad. News 7702, 7755; Note, An Empirical Study of the Magnuson-Moss Warranty Act, 31 Stan. L. Rev. 1117, 1119-1121 (1979); Roberts, The Magnuson-Moss Federal Warranty Act and Failure of Its Essential Purpose, Uniform Commercial Code 2-719(2), 33 Bus. Law. 1845 (1978); Brickley, supra, 19 Santa Clara L. Rev., at 78-79; Whiting,

Emerging Issues Under the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 45 Antitrust L. J. 72 (1976). Stated another way, Congress was concerned about minimum standards of product quality, which were already protected by common law and UCC express and implied warranties, as well as minimum standards of warranty and quality information. The warranty and quality information, often found in limited and confusing "filigree border" booklets, was the central object of Congress' requirements for minimum standards or disclosure and full and complete information.

The Congress' mandate for full disclosure and meaningful quality standards was carried out by the Act in two ways: (a) enforcement through Court action brought by the FTC, the Justice Department, or by injured consumers (Sec. 110 of

the Act, 15 U.S.C. Sec. 2310), and (b) regulation through the standards set forth in Secs. 101-109 (15 U.S.C. Secs. 2301-2309) and the rules promulgated by the FTC.

To date, it appears that industry has largely ignored or avoided the regulatory aspects of the Act. A 1977 poll conducted by the National Association of Service Managers concluded that consumers were receiving less warranty protection than they were prior to the Act. Note, supra, 31 Stan. L. Rev., at 1120, 1124, and 1127-1128. Finally, and perhaps most disturbing, a recent survey conducted for the FTC revealed that 30% of these breakdowns took one month or longer to resolve. Thus, one out of every ten new cars is essentially a "lemon." Note, U.C.C. - Consumer Protection Act-Limited Warranties-Automobile Manufacturer's Refusal to Recognize Buyer's Rights Under the U.C.C. When a Limited

Warranty Fails of its Essential Purpose Constitutes an Unfair Trade Practice Under the Consumer Protection Act-Ford Motor Co. v. Mayes, 575 S.W.2d 480 (Ky. Ct. App. 1978), 6 N. Kentucky L. Rev. 403 (1979). Despite the "regulatory aspects of the Act," today's new car purchasers still suffer from "being on the sticky end of a contract of adhesion," and the quality of the product is as bad or worse than it was 15 years ago when the problem was first studied. See, Note U.C.C.-Ford Motor Co. v. Mayes, supra, 6 N. Kentucky L. Rev., at 411.

This review of the broad history and purposes of the Act shows that the broadest protection of the consumer's interest was the foremost concern of Congress. The specific warranty abuses and generally "shoddy" products of the automobile industry were the primary wrongs Congress sought

to address. See Consumer Warranty Protection: Hearings on H.R. 6313, 6314, 261, 4809, 5037, 10673 (and other similar and identical bills), Before the Subcomm. on Commerce and Finance, Comm. on Interstate and Foreign Relations, 92d. Cong., 1st Sess. (1971) (Statements of Congressman Dingell, Rosenthal and O'Hara). One of the major tools Congress devised to correct this situation was to give the consumer a federal forum for class actions of national scope to pursue the fullest remedies for a supplier's breach of any express written warranty or implied warranty.

The issue in question centers on the exact meaning of the term "written warranty" as it is used in several places throughout the Act. As can be seen by an examination of the Seventh Circuit's opinion filed in this case, 660 F.2d 311, seven

Federal Judges have considered this issue to date. Five Judges (Judges Wood, Bauer and Fairchild of the Seventh Circuit and Judges McGarr and Moran of the Northern District of Illinois) appear to agree with Judge Wood's dissent in this case:

> . . .I would interpret the Act to mean that those written documents of General Motors which made specific representations of substance about the product, not just advertising ballyhoo, and which were introduced by General Motors into the transaction became, as a practical matter, inferentially incorporated into the written warranty. The written warranty would then more fully deserve its gold filigree frame. 660 F.2d 311, 323.

Plaintiffs submit that the issue addressed in this cause is worthy of consideration of this Court, not only because of its importance, but also because a majority of the judges addressing this issue appear to disagree with the two

judges of the majority opinion below. The confusion in the federal courts over whether a "written warranty" actionable by a private consumer under the Magnuson-Moss Act is limited to those "written warranties" expressly defined by Congress in the Act is readily seen by the brief history of the decisions on this issue.

The issue was initially addressed by Judge Frank J. McGarr in a case related to this action styled In re General Motors Engine Interchange, MDL 308 (N.D. Ill.), 594 F.2d 1106 (7th Cir. 1979) ("GM I"), and 620 F.2d 1190 (7th Cir. 1980 ("GM II"), (hereinafter the "Engine" case), wherein the complaints alleged that GM had secretly substituted Chevy engines in 1977 Oldsmobiles. In the course of that action, Judge McGarr ruled at least three times that the Magnuson-Moss Act provides a federal cause of action for breach of a "war-

ranty of identity" based upon written representations and advertising relating to the source or identity of an interchanged component.

GM first raised its §101(b)[15 USC §2301(6)] "definition" argument, that is, that the only written warranties actionable under the Act are those within the §101(6) definition of "written warranty," in its brief opposing class certification in the Engine case.* In commenting on his class certification opinion of October 13, 1977, wherein he rejected GM's "definiton" argument, Judge McGarr stated that

---

*Memorandum of General Motors Corporation in Opposition to Plaintiffs' Motions for Certification of a Nationwide Class, 77 C 917, 77 C 1006, 77 C 1435, filed 7-5-77, at 15; Rebuttal Memorandum of GM in opposition to Plaintiffs' Motions for Certification of a Nationwide Class, MDL 308, filed 8-19-77, at 5-6.

Magnuson-Moss and the remedies available under it, were perfectly adequate for the needs of the plaintiffs in the Engine case. See Transcript of Proceedings, MDL 308, 10-13-77 at 4.

GM next asserted its §101(6) "definition" argument against the engine switch claims in an extensive brief filed just prior to a Fairness Hearing on a contested settlement proposal held in May, 1978.* The argument based upon §101(6) was identical to the argument made to the District Court of Appeals below. Judge McGarr later indicated from the bench that he did not accept this argument as defeating the engine-switch theory or the asserted warranty of identity.

---

*Defendant General Motors' Fairness Hearing Memorandum Relating to Requirement for a Claim under the Magnuson-Moss Warranty Act, MDL 308, filed May 16, 1978.

> THE COURT: When I wrote the opinion, and entered the order--which rather ruthlessly slashed everything out of this case but the Magnuson-Moss claim itself--I think it obviously, inferentially, concluded that knowing the facts of this case that that case fits under the Magnuson-Moss Warranty provision.
>
> . . .I have assumed that Magnuson-Moss covered the factual situation in this case, and was designed by its framers or drafters to give protection to the plaintiff class of the type that we have under the facts in this case. (emphasis added) Transcript of Proceedings MDL 308, October 16, 1978, at 30.

Finally, GM attempted to persuade Judge McGarr that §101(6) somehow barred plaintiffs' warranty claims in its unsuccessful motion for summary judgment against post-April 10, 1977, purchasers in the Engine case. Judge McGarr denied the motion in his written opinion of November 20, 1979, wherein he stated at page 11:

> GM once again argues that no plaintiff can assert a claim under the Magnuson-Moss Warranty Act, 15 U.S.C. Sec. 2301 et seq. because no written express or implied warranty was extended by itself or its dealers. This issue was resolved in favor of plaintiffs during the hearings regarding the fairness of the proposed settlement of the claims of the pre-April 10 purchasers. (emphasis added).

The Engine case addressed the THM 200 transmission issue long before the complaint in this action was filed. From the very inception, the complaints in the Engine case had alleged that GM not only secretly substituted Chevy engines in 1977 Oldsmobiles, but that the substitutions allegedly included other major drivetrain components, particularly the transmission. In re General Motors Engine Interchange Litigation, 594 F.2d 1106 at 1114, 1132, n. 44 (7th Cir. 1979). During the discovery which preceded the Fairness

Hearing on the settlement jointly proposed by GM and 47 State Attorneys General, plaintiffs' attorneys found that GM had in fact substituted the alleged lightweight THM 200 transmission, originally designed for the subcompact Chevette, in all 1977 Delta 88's, whether they had the Oldsmobile Rocket engine or the substitute Chevy V-8. Discovery also evidenced that GM had expressly stated in brochures and catalogs that the heavier duty THM 350 was "standard" in those cars, without any mention of the THM 200 substitution.

Plaintiffs presented their "transmission switch" evidence to Judge McGarr at the Fairness Hearing in May, 1978. Judge McGarr refused to consider the transmission switch issue in evaluating the settlement, even though GM's proposed release included a waiver of all consumer

claims for the entire drivetrain, including the transmission.

Thus, the transmission switch was a major issue asserted by plaintiffs in the GM I appeal. In fact, the Seventh Circuit Court of Appeals, by Judges Thomas E. Fairchild, William J. Bauer, and Harlington Wood, Jr. made the following comments on the issue:

> For reasons which do not appear with clarity in the record, GM decided in 1976 to install in all 1977 Oldsmobile Delta 88 coupes and sedans, the THM 200 transmission instead of the THM 350, the transmission traditionally used in those cars. The THM 200, like the THM 350, is produced by GM's Turbohydramatic Division. The THM 200, originally designed for use in the subcompact Chevette was used in all 1977 Delta 88 coupes and sedans regardless of whether they contained Oldsmobile or Chevrolet engines. The appellants maintain that GM's advertising materials nonetheless indicated that the THM 350 was standard equipment in all 1977 Deltas. (GM I, 594 F.2d 1106, 1114).

* * *

> With respect to the alleged transmission switch in Delta 88's, the court apparently misapprehended the nature of the objectors' claims. The court noted that all Delta 88 coupes and sedans contained the THM 200 regardless of whether they had Chevrolet or Oldsmobile engines. The gist of objectors' claim, as we understand it, is that the transmissions used simply were not those warranted. Thus, the fact that all Delta 88 sedan and coupe purchasers received the smaller transmission is irrelevant. If objectors' [plaintiffs herein] contention is correct, GM breached its warranty to all Delta purchasers [regarding the transmission switch] not just those who received Chevrolet engines. (GM I, 594 F.2d 1106, 1132, n. 44). [Emphasis added.]

While the GM II appeal was pending, the instant action was filed and GM filed its motion to dismiss. GM's principal contention centered on a very narrow construction of the phrase "written warranty," i.e., that the remedy for an express writ-

ten warranty should be restricted to a narrowly construed definition included in §101(6) of the Act, 15 U.S.C. §2301(6), and further, that this definition should wholly control and limit all the rights and protections relating to express warranties Congress meant to give consumers in the entire statute.

The District Court's opinion below rejected GM's argument and was consistent with Judge McGarr's earlier rulings. Judge James B. Moran's opinion on October 1, 1980, agreed with plaintiffs' contention that the purview of the Act does not end with a narrow interpretation and application of §101(6). Judge Moran noted the realities of the typical automobile sale, and recognized that the Seventh Circuit's earlier statements in the Engines case supported his "inclusion" theory of

written warranties under the Act:

> In a typical automobile sale, a purchaser receives a pile of written documents. A formal warranty can be presented along with, or even contained inside, a brochure or manual. As part of the same transaction, the purchaser may examine the sticker or label on the automobile and other printed material supplied in connection with the sales transaction. There is little reason to believe that a purchaser will distinguish between written representations made in the accompanying material. If a warrantor describes in the sales literature the type of transmission he is selling and states in the text of a formal warranty that the quality of the transmission is warranted for a particular time, the effect on the consumer will likely be the same as if the warrantor includes the description in the formal warranty document.
>
> There is nothing in the legislative history of the Act to suggest that Congress intended this kind of artificial distinction to determine the rights and remedies of the consumer.

> Apparently following this type of reasoning, the court of appeals in the "engine interchange" litigation noted, simply, that "the transmissions were not those warranted," and implied that whether such a representation was contained in the formal warranty was irrelevant. In re General Motors Corp. Engine Interchange Litigation, supra, 594 F.2d 1106, 1132, n. 44. (As quoted at 500 F. Supp. 1181, 1190).

Thus, the case history on this issue reveals that five of the seven federal judges who have considered this issue appear to agree with the dissenting opinion of Judge Wood wherein he concluded that the written documents of General Motors which made specific representations of substance about the product and which were introduced by General Motors into the transaction became inferentially incorporated into the written warranty. The majority's opinion below is in direct conflict with prior decisions in the federal courts

and, therefore, requires review by this Court.

I.

THE SEVENTH CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S HOLDING THAT EXPRESS WRITTEN WARRANTIES BEYOND THE "FILIGREE E RDER" ARE ACTIONABLE UNDER SECTION 110(d)(1) OF THE MAGNUSON-MOSS ACT. THE MAJORITY'S OPINION CONFLICTS WITH ALL PRECEDENT ON THE ISSUE.

The District Court, Judge James B. Moran presiding, correctly held that some documents outside the supplier's "warranty booklet" create actionable warranties under Section 110(d)(1) of the Act, 15 U.S.C., §2310(d)(1). A significant factor in Judge Moran's decision was his recognition that Congress had not simply attached one meaning to the phrase "written warranty," but rather had used the phrase in many different ways throughout the various sections of the Act:

> The Act itself suggests several different possible meanings of the phrase "written war-

ranty." The definition in §101(6) is, by itself, relatively clear. As discussed above, a written warranty under subsection (A) of §101(6) is a particular type of "affirmation" or "promise." Other provisions of the Act, however, do not employ this definition. For example, the next section of the statute implies that a written warranty is not a particular type of promise or affirmation, but rather a document containing such representations along with others. Section 102 authorizes the Federal Trade Commission to promulgate rules requiring "inclusion in the written warranty" of various explanations of the rights of the consumer, including such statements as a "brief, general description of the legal remedies available to the consumer." 15 U.S.C. §2302(a). A description of the legal status of the consumer is not a written warranty under the narrow definition of §101(6), but Congress apparently intended, if a warrantor distorts or fails to comply with such a description which has been included in a document also containing §101(6) warranties, that this failure would be actionable as a breach of a written warranty. A written warranty is not just a particular type of "promise" or

> "affirmation" but a type of document or written contract as well. 500 F. Supp. 1181, 1187.

In addressing the ambiguity presented by §102, the majority below simply states that the "text of a 'written warranty' must, in the nature of things, be written on something." 660 F.2d 311, 322. The majority apparently acknowledges that an ambiguity exists when in construing §102 they conclude:

> It is more appropriate to read the inconsistent phrase "inclusion in the written warranty" or "inclusion in the document containing the written warranty." 660 F.2d 311, 322.

Of course, §102 does not read the way the majority would find appropriate and, therefore, there exists an obvious ambiguity. GM itself realized the ambiguity presented by §102 for it conceded below that a "written warranty" can be a "particular type" of

written promise and the document incorporating it. Once "written warranty" is admitted to be something more than a verbatim quote of §101(6), Judge Moran's "incorporation" theory becomes irrefutable.

Judge Moran found further ambiguities within the Act in regard to the phrase "written warranty:"

> Other sections of the statute create additional ambiguities. Section 110(c)(2)(B), for example, defines a "deceptive warranty" as "a written warranty created by the use of such terms as 'guaranty' or 'warranty', if the terms and conditions of such warranty so limits its scope and application as to deceive a reasonable individual." 15 U.S.C. §2310(c)(2)(B). Apparently, a written warranty can be "created" by the use or misuse of the words "guaranty" or "warranty" even if the document using these terms does not include representations which constitute warranties under §101(6). 500 F. Supp. 1181, 1187-88.

In speaking to the ambiguity created by §110(c)(2)(B), the majority below conceded that the district court offers a sensible reading of the provision in construing it to mean that a "written warranty" can be created by the use of the words "guaranty" or "warranty." 660 F.2d 311, 321. The majority again apparently admits to the ambiguity in the provision, but concludes that its own construction of the provision is the most likely construction intended by Congress. The majority's "diction" in resolving this ambiguity reveals the unconvincing nature of its conclusion:

> Thus, while the draftsmen's diction may have been suspect (insofar as they used the phrase "created by the use of" instead of "including" or "containing") it appears most plausible that they intended for the term "deceptive warranty" to mean a written warranty as defined in §101(6), which contains such terms as "guaranty" or "warranty," if the warranty's

terms and conditions "so limit its scope and application as to deceive a reasonable individual." 660 F.2d 311, 321.

Finally, Judge Moran found an ambiguity within the Act as to the term "written warranty" in §103(b), 15 U.S.C. §2303(b):

> Section 103(b) of the Act adds further to the confusion by stating that the sections of the statute regulating the contents of written warranties should not be interpreted to apply "to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations." 15 U.S.C. §2302(b). If GM's narrow definition of written warranties were correct, this provision would be unnecessary; yet the text and the legislative history of this section indicate a substantial concern with the possibility that broad representations such as "satisfaction guaranteed or your money back" would constitute written warranties under the Act. See H. Rep. 93-107, supra, 1974 U.S. Code Cong. & Admin. News at 7719. Congress must have anti-

> cipated in certain circumstances that written representations having little connection with documents containing §101(6) warranties might still be covered by the Act. 500 F. Supp. 1181, 1188.

In addressing this ambiguity, the majority below found it possible to construe these "expressions of general policy" to fit within the §101(6) definition of "written warranty:"

> For example, a written statement that "your money will be refunded if you are not completely satisfied" might be deemed to constitute an "undertaking in writing in connection with the sale by a supplier of a consumer product to refund . . .in the event that such product fails to meet the specifications set forth in the undertaking," i.e., complete satisfaction. 15 U.S.C. §2301 (6)(B) (1976). Section 103(b) may quite plausibly have been included in the Act precisely to foreclose such interpretations. 660 F.2d 311, 320-21. [Emphasis added.]

The majority below certainly had to

strain in order to conclude that a general statement such as "complete satisfaction" might be deemed to be a specification set forth in the undertaking. Again, the majority's own "diction" reflects that it is less than sure that Congress intended the meaning of this provision to be that which the majority has determined it to be.

The majority's rigid reading of the Act so as to limit the term "written warranty" to its definition in §101(6) is anything but persuasive. Indeed, Judge Wood in his dissent rejected the majority's blind adherence to §101(6):

> This is a close case of statutory interpretation, but I respectfully dissent from the majority's conclusion that the Act must be so strictly and rigidly read as to exclude coverage of the alleged transmission substitution by General Motors.

* * *

> As Judge Moran noted, 500 F. Supp. at 1184, he was not the first one to have some difficulty interpreting the Act. Others before him have characterized it as serving as no exemplar of legislative clarity. I would, therefore, not begin and end by viewing the Act's definition provisions in such isolation as to conclude that the beneficial consumer protection purposes of the Act are thereby completely limited. 660 F.2d 311, 323.

After finding that the Congress was not consistent with the use of the phrase "written warranty," Judge Moran correctly turned to the legislative history for guidance. He followed the clear rule that where a statute is ambiguous, unclear, or inconsistent on its face, the Court should construe the statute in accordance with the broad goals which Congress intended to effectuate. F.T.C. v. Fred Meyer, Inc. 390 U.S. 341, 349 (1968); F.T.C. v. Sun Oil Co., 371 U.S. 505, 518 (1963). In so doing, Judge Moran determined that the

"written warranty" as used in §110(d)(1) of the Act was intended to have a broader scope than that suggested by the definition in §101(6):

> If the statute itself reflects some confusion over the meaning of the phrase "written warranty," the legislative history is even more puzzling. Throughout many of the Congressional hearings and floor debates on proposed versions of the Act, the legislators assumed that there were two types of express warranties: oral and written. The discussion indicated little awareness that the statute on its face regulated only a narrow range of written, express warranties as the term is used in the Uniform Commercial Code. Some of this confusion probably resulted from the fact that earlier forms of the statute, including the version first passed by the Senate, contained a separate provision for breach of express warranties generally. See S. 356, 119 Cong. Rec. 29491 (1973). Express warranties and implied warranties were treated together in these earlier bills, whose principal effect was to authorize awards of costs and expenses, including

attorneys' fees, to consumers who "prevail[ed] in any suit or proceeding for breach of an express or implied warranty . . ." Id. The bills mirrored the definition of express warranties in §2-313 of the Uniform Commercial Code, including the Code's provision that any "description of a consumer product which is made part of the bargain creates an express warranty that the consumer product shall conform to that description." Id.

The House rejected this approach and adopted a version of the Act which deleted any reference to "express" warranties, though retaining a cause of action for breach of implied warranties. The Conference Committee endorsed the House version of the bill. However, the Committee believed that in rejecting the Senate bill it only prevented attorneys' fees awards for breaches of oral warranties. The Committee report explained:

> The Senate bill afforded reasonable attorney's fees to a consumer who successfully sued for the breach of an express oral warranty. The House amendment did not provide reasonable attorney's fees in that situation. The conferees adopted the House approach but stated they would

reexamine the issue if oral warranties became more prevalent.

Joint Explanatory Statement of the Committee of Conference, supra, 1974 U.S. Code Cong. & Admin. News at 7758. The Conference Committee approached the express warranty provisions of the Senate bill as applying only to oral, express warranties, apparently assuming that the private remedy for breach of "written warranties" already adequately covered the field of written, express warranties as defined by the Uniform Commercial Code. House subcommittee hearings discussing this issue also support this conclusion: the intent of the House in eliminating the Senate remedies for breach of express warranties was largely to avoid the difficult problems and factual uncertainties of proof and liability connected with oral warranties, not to restrict the range of written representations protected by the Act. The statute thus contains yet another ambiguity-the phrase written warranty as used in §110(d) of the Act, authorizing private suits for breach of written warranties, is apparently intended to have a broader scope than that suggested by the definition in §101(6). 500 F. Supp. 1181, 1188-89.

Judge Moran resolved the ambiguity caused by different usage of the phrase "written warranty" by searching the Congressional History and attempting to interpret the statute as a whole. This analysis is, of course, consistent with the rules of statutory construction long established by the Supreme Court. See e.g., Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 250 (1970) Richards v. United States, 369 U.S. 1, 11 (1962).

The majority below determined that none of the legislative history offered by plaintiffs provided "the clear evidence of Congressional intent necessary to overcome the 'familiar principle governing the interpretation of statutes. . .that if a statutory definition of a word is given, that definition must prevail, regardless of what other meaning may be attributable to

the word.' Evans v. Int'l Typographical Union, 76 F. Supp. 881, 887 (S.D. Ind. 1948): 660 F.2d 311, 316-17. Simply put, the majority's conclusion is that the definition of "written warranty" in §101(6) of the Act strictly controls the entire legislation which took Congress over ten years to enact. The majority would preclude any consumer remedies for breach of an express written warranty unless the "magic words" of §101(6) appear in the writing itself. This argues too much. As Judge Moran recognized, §101(6) is not the tail that wags the dog, and is itself ambiguous when read against the entire statute. Recognizing such an internal conflict on the face of the statute, Judge Moran correctly turned to the legislative history, which overwhelmingly supports a cause of action based on documents external to the "paper with the filigree border."

Most importantly, Judge Wood in his dissent below rejected the majority's conclusion and recognized that the Act needed some limited judicial "first aid" in order to be able to accomplish the remedial purposes sought by Congress. In support of this conclusion, Judge Wood cited the following sensible and practical legal principles:

> See United States v. American Trucking Associations, 310 U.S. 534, 543 (1940); "[E]ven when the plain meaning [of the statute] did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (footnoest omitted). For one of the earliest statements of the applicable principles of statutory construction, see Heydon's Case, 30 Co. 7a, 76 Eng. Rep. 637 (Exchequer 1584): "[F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) [among the] four things [which] are to be discerned and considered [is]: . . .4th. The true reason of the remedy, and then the office of all the Judges is always to

> make such construction as shall suppress the mischief [at which the statute is aimed], and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act. . ." (Emphasis added). See generally W. Hurst, Statutes in Court 142, 184-201 (1970).

Likewise, such limited judicial first aid was deemed necessary by Judge Moran in the District Court:

> [I]n such transactions the Act not only regulates the contents and effect of the warranty document itself, but is also designed to provide a basis level of honesty and reliability to the entire transaction. Therefore, the Act requires certain written representations, generally the "paper with the filigree border," which trigger the Act's protections. Other written promises presented in connection with the same transaction should also be enforcible as part of the "written warranty."
>
> Any other result would be contrary to the goals of the statute to "promote consumer understanding" and "insure certain basis protection for con-

> sumers purchasing consumer products which have written warranties." 119 Cong. Rec. 968, quoted supra. 600 F. Supp. 1181, 1190.

Construing the Act as providing a remedy for written promises presented in connection with the sale of a formally warranted product is the only logical and reasonable conclusion possible in view of the policy suggested by the statute's treatment of implied warranties. As Judge Moran opined:

> [S]ection 110 of the Act creates a broad federal cause of action for breach of implied warranties, at least for consumers who receive written warranties. 15 U.S.C. §2310(d)(1). The purpose of this provision is to "insure a certain basic protection for consumers purchasing consumer products which have written warranties." 119 Cong. Rec. 968 (1973). Congress, therefore, indicated that although the Magnuson-Moss Act only regulates transactions involving written warranties as the term is narrowly defined in §101(6), once a consumer is

> involved in such a transaction there is a policy of providing federal remedies beyond the four corners of the formal warranty. Permitting a consumer to sue a warrantor for violating any written representations made in connection with the sale of the same product which is covered by a formal warranty furthers this goal. A narrower reading of the Act would elevate form over substance and would frustrate the purpose of the legislature. 500 F. Supp. 1181, 1191.

In summary, no one questions the fact that the Magnuson-Moss Act is not an exemplar of legislative clarity. As Judge Moran and Judge Wood recognized in their opinions, it is in these situations that consideration must be given to the total corpus of pertinent law and policies that inspired ostensibly inconsistent provisions. Against this "total corpus" of the Act, it is plainly seen that the majority's decision below runs contrary to the express structure of the Act, the legislative history, and the fundamental principles of common sense.

Early in his opinion, Judge Moran cited the classic statement on obscure legislation by Judge Henry T. Friendly in Friendly, The Gap in Lawmaking-Judges Who Can't and Legislators Who Won't, 63 Colum. L. Rev. 787 (1963). 500 F. Supp. 1181, 1184, n. 5. In this article, Judge Friendly reviewed two types of statutes which impose upon the courts a duty to review the legislation passed by Congress: (1) the occasional statute where the legislature succeeded in literally saying something it probably did not mean, and (2) the statutes that are ambiguous or where two meanings are possible. Id., at 792, 793. In each case, if the legislature takes no move to correct the statute, either the courts must take action, or confusion will reign and the real intent of Congress will be frustrated.

The majority's decision below ignores the ambiguities in the Magnuson-Moss Act and interprets the Act in such a way as to emasculate and eliminate the most vital protection available for consumers to receive the exact product that the manufacturer expressly warranted he would receive. See, In Re General Motors Corporation Engine Interchange Litigation, 594 F.2d 1106, 1132, n. 44 (7th Cir. 1979). In so concluding, the majority's opinion conflicts with all precedent on this issue.

Thus, this Court is presented with an opportunity to resolve the ambiguities, or even mistakes in the Act, and accomplish Congress' true purpose of providing consumers with a federal cause of action for the written warranties beyond the "filigree border." By accepting this petition and ruling uponthis case, the Court can

give final clarity to the scope of warranties actionable under §110(d) [15 U.S.C. §2310(d)(1)] of the Act.

CONCLUSION

For the reasons set out above, petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and the decision of the Court of Appeals for the Seventh Circuit should be reviewed.

Respectfully submitted,

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 11, 1981

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

ARLIE GLEN SKELTON, JR., et al.,

Plaintiffs-Appellees,

No. 80-2781 vs.

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79-C-1243—JAMES B. MORAN, *Judge*.

ORDER

Treating the "Petition for Rehearing *En Banc*" in the above-entitled cause as a petition for rehearing under F.R.A.P. Rule 40, the majority of the original panel* having voted to DENY,

Treating the petition as a suggestion for rehearing *en banc* under F.R.A.P. Rule 35, a vote of the active members of the court was requested, and a majority of the active members have not voted to grant a rehearing en banc.** Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Harlington Wood, Jr. voted to grant petition for rehearing *en banc*.

** The Honorable Walter J. Cummings and Wilbur F. Pell, Jr. disqualified themselves and did not participate in consideration of this petition for rehearing.

Appendix

81-1707

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CLERK

No.

IN THE

Supreme Court of the United States

MARCH TERM, 1982

ARLIE GLEN SKELTON, JR., et al.,
Plaintiffs-Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Defendant-Respondent.

APPENDIX

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In The

Supreme Court of the United States

March Term, 1982

ARLIE GLEN SKELTON, JR., et al.,

Plaintiffs-Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Defendant-Respondent.

APPENDIX

APPENDIX 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2781

ARLIE GLEN SKELTON, JR., et al.,

Plaintiffs-Appellees,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-1243, **James B. Moran**, *Judge.*

ARGUED FEBRUARY 19, 1981—DECIDED SEPTEMBER 28, 1981

Before SWYGERT, *Senior Circuit Judge,* WOOD and CUDAHY, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Section 110(d) of Title I of the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act ("Magnuson-Moss" or the "Act") creates a federal private cause of action for consumers damaged by the failure of a warrantor "to comply with any obligation under . . . a written warranty." 15 U.S.C. § 2310(d)(1) (1976). The issue on this interlocutory appeal is whether a "written warranty" actionable under § 110(d) is limited to the particular promises, undertakings or affirmations of fact expressly defined as "written warranties" by Congress in the Act. The district court held that § 110(d) provides a federal cause of action not merely for breach of a "written warranty" as defined in the Act but also for breach of "all written

promises presented in connection with the sale of a formally warranted product." 500 F. Supp. 1181, 1190 (N.D. Ill. 1980). We reverse.

I.

Plaintiffs, purchasers of automobiles manufactured by defendant General Motors Corporation ("GM"), brought this action as a nationwide class action on behalf of all purchasers of GM automobiles manufactured from 1976 through 1979. In Count I of their amended complaint, plaintiffs allege that GM, through its "brochures, manuals, consumer advertising and other forms of communications to the public generally and to members of plaintiffs' class specifically," warranted and represented that 1976 through 1979 GM automobiles contained THM 350 (M38) transmissions, or "transmissions of similar quality and performance. . . . and that [such transmissions] would meet a specified level of performance." Plaintiffs charge in Count I that, contrary to these warranties and representations, GM substituted inferior THM 200 (M29) transmissions for THM 350 (M38) transmissions in GM automobiles manufactured from 1976 through 1979. This undisclosed substitution is alleged to constitute a violation of written and implied warranties under § 110(d) of Magnuson-Moss. In Count II, plaintiffs claim that the substitution is actionable as a "deceptive warranty" under § 110(c)(2) of the Act, 15 U.S.C. § 2310(c)(2) (1976).

General Motors moved to dismiss both counts of plaintiffs' complaint for failure to state a claim upon which relief could be granted. On October 1, 1980, the district court granted this motion with respect to the "implied warranty" portion of Count I and the "deceptive warranty" claim in Count II, but denied GM's motion to dismiss the "written warranty" claim in Count I. 500 F. Supp. 1181 (N.D. Ill. 1980). GM's interlocutory appeal from the district court's refusal to dismiss the "written warranty" claim was certified by the district court on October 31, 1980 and accepted by this court on December 4, 1980. Plaintiffs did not take timely interlocutory appeals from the district court's determinations against them with

respect to the "implied warranty" and "deceptive warranty" claims.[1]

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[1] This case is related to the much-publicized "engine interchange" litigation, a consolidated class action brought against GM on behalf of all purchasers of 1977 Oldsmobile automobiles equipped with engines produced by GM's Chevrolet division. That litigation has been before this court twice on questions concerning, first, the district court's approval of a subclass settlement, *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) and, second, the sufficiency of a notice which detailed an offer of settlement to individual subclass members, *Oswald v. McGarr*, 620 F.2d 1190 (7th Cir. 1980). Nothing in our opinions or in the district court's orders in that case, however, directly addresses the issue before us here—namely, whether a warranty of description of an automobile component is actionable as a "written warranty" under § 110(d) of Magnuson-Moss. In this regard, plaintiffs have referred us to the following paragraph from *In re General Motors Corp. Engine Interchange Litigation*:

> The trial court's findings contain no express discussion of the merits of the Magnuson-Moss claim. Indeed, with respect to the alleged transmission switch in Delta 88s, the court apparently misapprehended the nature of the objectors' claims. The court noted that all Delta 88 coupes and sedans contained the THM 200 regardless of whether they had Chevrolet or Oldsmobile engines. The gist of objectors' claim, as we understand it, is that the transmissions used simply were not those warranted. Thus, the fact that all Delta 88 sedan and coupe purchasers received the smaller transmission is irrelevant. If objectors' contention is correct, GM breached its warranty to all Delta purchasers, not just those who received Chevrolet engines.

594 F.2d at 1132 n.44. This statement, which does not purport to be dispositive of anything, is not part of our holding in that case. It has merely become part of the detritus of lawsuits.

We do not know why the issue before us now was not explicitly considered in the engine interchange litigation. It may be that it was not raised there (although plaintiffs suggest to the contrary). It may also be, as suggested by two commentators, that the engine switch was alleged in that case to be a

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II.

Magnuson-Moss is, in the main, a remedial statute designed to protect consumers from deceptive warranty practices. Its draftsmen believed that consumer product warranties often were too complex to be understood, too varied to allow meaningful comparisons and too restricted to provide meaningful warranty protection. *See* S. Rep. No. 93-151, 93d Cong., 1st Sess. 6-8 (1973); H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 22-29, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7702, 7705-11.[2] The Act's draftsmen sought to remedy these

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[1] *continued*
breach of the implied warranty of merchantability, which is defined in U.C.C. § 2-314, as follows:

> (2) Goods to be merchantable must be at least such as
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and
> (c) are fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.

See Miller and Kanter, *Litigation Under Magnuson-Moss: New Opportunities in Private Actions*, 13 U.C.C. L.J. 10, 14 (1980). *Cf. Fischback & Moore Int'l Corp. v. Crane Barge R-14*, 476 F. Supp. 282, 287 (D. Md. 1979) ("Where an affirmation of fact is made on a product or its container, an implied warranty arises that the product will conform to the representations.") We of course express no opinion concerning the district court's holding in this case that the transmission switch did not constitute a breach of implied warranty because plaintiffs' complaint did not "suggest that the cars were unfit for driving or below a minimally acceptable standard of quality." 500 F. Supp. at 1192.

[2] The Report of the House Committee on Interstate and Foreign Commerce states a particular concern that appeared recurrently in legislative discussions of the Act:

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perceived ills by imposing extensive disclosure requirements and minimum content standards on particular types of written consumer product warranties. And, to promote enforcement of these warranties, the draftsmen devised a detailed remedial apparatus, which includes optional informal dispute settlement procedures as well as private and governmental judicial actions.

Although Magnuson-Moss does not require any manufacturer or seller to extend a warranty with its product,[3] any "written warranty" offered with a consumer product is subject to the Act's regulatory requirements. The term "written warranty" is defined "for purposes of [the Act]" in § 101(6), which reads:

> (6) The term written warranty means—
>
> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

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[2] *continued*

> [T]he paper with the filigree border bearing the bold caption 'Warranty' or 'Guarantee' was often of no greater worth than the paper it was printed on. Indeed, in many cases where a warranty or guarantee was ostensibly given the old saying applied 'The bold print giveth and the fine print taketh away.' For the paper operated to take away from the consumer the implied warranties of merchantibility and fitness arising by operation of law leaving little in its stead.

H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 13, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7706.

[3] Not only does the Act not require the provision of warranties of any kind, it also bars the FTC from so requiring as well, in § 102(b)(2), which reads: "Nothing in this title . . . shall be deemed to authorize the Commission . . . to require that a consumer product or any of its components be warranted." 15 U.S.C. § 2302(b)(2) (1976).

> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,
>
> which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6) (1976).

Sections 102 through 109 of the Act set forth the content and disclosure rules applicable to all "written warranties." Section 102 provides that "any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by the rules of the [Federal Trade] Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (1976). Pursuant to this provision, the FTC has, by regulation, required that warrantors made detailed disclosures of information necessary to allow consumers to understand and enforce written warranties.[4] The FTC regulations also require, pursuant to

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[4] This regulation reads:

> Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information:
>
> (1) The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty;
>
> (2) A clear description and identification of products, or parts, or characteristics, or components or properties covered by and where necessary for clarification, excluded from the warranty;

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[4] *continued*

(3) A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide;

(4) The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration;

(5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name(s) of the warrantor(s), together with: the mailing address(es) of the warrantor(s), and /or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance;

(6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with Part 703 of this subchapter;

(7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in Section 108 of the Act, accompanied by the following statement:

> Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

(8) Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement, which may be combined with the statement required in paragraph (a)(7) of this section:

> Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

(9) A statement in the following language:

> This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

16 C.F.R. § 701.3(a) (1980).

§ 102(b), that sellers of consumer products with written warranties make available to the consumer the text of such warranties prior to sale. 16 C.F.R. § 702.3 (1980).

Under § 103, warrantors must conspicuously designate written warranties as either "full" or "limited." If a warranty is designated as "full," § 104 provides that the warrantor must (1) remedy defects or malfunctions without charge and within a reasonable period of time; (2) make no limitation on the duration of any implied warranty on the product; (3) provide for no exclusion of limitation of consequential damages unless conspicuously stated, and (4) refund or replace the product if, after a reasonable number of attempted repairs, the supplier fails to remedy defects or malfunctions. 15 U.S.C. § 2304 (1976).

An additional obligation placed on suppliers extending written warranties is found in § 108, which provides that such suppliers may not disclaim, modify or limit the duration of implied warranties to a period shorter than the "duration of a written warranty of reasonable duration." 15 U.S.C. § 2308 (1976).[5]

Section 110(d) creates a private cause of action for breach of "written warranty," subject to the requirements that: (1) the consumer must have an individual claim of at least $25; (2) the total amount in controversy must equal or exceed $50,000; and (3) if brought as a class action, the complaint must name at

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[5] Any such limitation must be "conscionable and . . . set forth in clear and unmistakable language and prominently displayed on the face of the warranty." 15 U.S.C. § 2308(b) (1976). The FTC has interpreted the phrase "on the face of the warranty" to mean:

> (1) Where the warranty is a single sheet with printing on both sides of the sheet or where the warranty is comprised of more than one sheet, the page in which the warranty text begins;
>
> (2) Where the warranty is included as part of a larger document, such as a use and care manual, the page in such document on which the warranty text begins.

16 C.F.R. § 701.1(i) (1980).

least one hundred plaintiffs. 15 U.S.C. § 2310(d)(3) (1976).[6] Section 110 also makes any failure to comply with the requirements of the Act a violation of § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1) (1976)), and empowers the FTC and the Attorney General to seek injunctive relief against (1) failure to comply with any obligation under the Act, and (2) written warranties which may be "deceptive" to a reasonable individual. 15 U.S.C. § 2310(c) (1976).

III.

The scope of the private action for breach of "written warranty" created by § 110(d) is the issue presented to us for resolution.[7] Section 110(d) provides in part that:

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[6] Additionally, if a supplier has established an internal dispute settlement procedure pursuant to § 110(a), the consumer generally may not commence an action under § 110(d) without first having resorted to the established procedure. 15 U.S.C. § 2310(a)(3) (1976). The minimum requirements for any informal dispute settlement procedure created pursuant to § 110(a) are set forth at 16 C.F.R. § 703 (1980).

[7] Plaintiffs' complaint alleged that GM had warranted that its automobiles contained THM 350 (M38) transmissions, or "transmissions of similar quality and performance . . . and that [such transmissions] would meet a specified level of performance." The district court concluded that such a warranty did not fall within the § 101(6) definition of "written warranty," because it did not affirm that the transmission would "meet a specified level of performance *over a specified period of time*." 15 U.S.C. § 2301(6) (1976) (emphasis added). *See* 500 F. Supp. at 1185-86. This conclusion is consistent with the FTC's interpretation of § 101(6), which is set forth in its regulations at 16 C.F.R. § 700.3(a) (1980):

> The Act imposes specific duties and liabilities on suppliers who offer written warranties on consumer products. Certain representations, such as energy efficiency ratings for electrical appliances, care labeling of wearing apparel, and other product information disclosures may be express warranties under the Uniform Commercial Code. However, these disclosures alone are not written warranties under this Act. Section 101(6) provides that a

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> [A] consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief [in any state court of competent jurisdiction or in an appropriate federal district court].

15 U.S.C. § 2310(d)(1) (1976).

The district court properly rejected plaintiffs' argument that the Act's draftsmen intended in § 110(d) to create a federal private cause of action for breach of all

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[7] *continued*

written affirmation of fact or a written promise of a specified level of performance must relate to a specified period of time in order to be considered a "written warranty." A product information disclosure without a specified time period to which the disclosure relates is therefore not a written warranty.

The district court noted that, by this reading of § 101(6), a representation that a "transmission would perform like a THM 350 transmission for the life of the transmission" would constitute a "written warranty," while the representation that a "transmission would perform like a THM 350 transmission" does not. The arbitrariness of this distinction is apparent, but a certain amount of arbitrariness is inevitable whenever a bright line must be drawn. And the need for a clearly circumscribed definition in the statutory scheme before us is apparent since, to comply with the Act's obligations, manufacturers and suppliers must know in advance exactly which representations are subject to those obligations. Moreover, it is quite plausible that the Act's draftsmen defined "written warranty" in § 101(6) so as to exclude general descriptions of consumer products or their components from the reach of the Act, since it would be excessively cumbersome to impose the Act's disclosure rules on every advertisement containing a description of a product or its components. On this appeal, plaintiffs do not challenge the district court's conclusion that the warranties described in their complaint are not within the § 101(6) definition. 500 F. Supp. at 1185-86.

written express warranties.[8] None of the legislative history offered by plaintiffs in this record provides the clear evidence of Congressional intent necessary to overcome the "familiar principle governing the interpretation of statutes . . . that if a statutory definition of a word is given, that definition must prevail, regardless of what other meaning may be attributable to the word." *Evans v. Int'l Typographical Union*, 76 F. Supp. 881, 887 (S.D. Ind. 1948).[9] Indeed, we are less than confident

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[8] The Uniform Commercial Code, § 2-313 defines "express warranty" to mean:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

[9] Of course, it is inappropriate to blindly adhere to a statutory definition if such adherence would frustrate clearly expressed legislative intent. Thus, in *United States v. Walton*, 514 F.2d 201 (D.C. Cir. 1975), the court rejected defendant's argument that the statutory definition of marijuana should prevail in a prosecution for unlawful distribution of marijuana under the Controlled Substances Act of 1970. Finding that the "legislative history is absolutely clear that Congress meant to outlaw all plants popularly known as marijuana to the extent those plants possess THC." 514 F.2d at 203-04, the court held that the term "marijuana" as used in the Act included all species of cannibus containing THC, even though the statute defined marijuana as cannibus sativa L., which, arguably, was only one of several known species of cannibus containing THC. *Accord, United States v. Lupo*, 652 F.2d. 723 (7th Cir. 1981); *United States v. Kelly*, 527 F.2d 961 (9th Cir. 1976); *United States v. Gavic*, 520 F.2d 1346 (8th Cir. 1975).

As a rule, however, there should be a strong presumption that a statutory term means what it is defined to mean, because, by the very act of including a definition in the

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that it is possible to distill any unambiguous Congressional intent from the Act's legislative history. As the district court noted:

> [A review of the Act's legislative history] is the legal equivalent of an archaeological dig. Various consumer warranty bills were pending before the House and Senate for four years, during which each body defined, discarded, reintroduced and redefined concepts which in some fashion or another are related to the enacted legislation. Some provisions of the Act are vestigial reminders of concepts buried but not totally forgotten during the on-going legislative process. Both proponents and opponents of an expansive interpretation have cited compelling, to them, legislative history only dimly related to the language which finally emerged as law.

500 F. Supp. at 1184.

In support of their argument that § 110(d) created a federal private cause of action for breach of all written express warranties, plaintiffs rely heavily on the fact that the version of § 110 passed by the Senate and submitted to Conference had both defined "express warranty" and created a cause of action for breach of any express or implied warranty.[10] But the Conference rejected

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[9] *continued*
statute, the statute's draftsmen have made a considered determination of the appropriate meaning of that term for the purposes of the particular statutory scheme they have created. Nothing offered by the plaintiffs is sufficient to suggest that Congress did not intend for the definition it ascribed to "written warranty" for purposes of the Act in § 101(6) not to apply to the phrase "written warranty" in § 110(d).

[10] The Senate version of § 110 provided in part:

> (b) Any purchaser damaged by the failure of a supplier to comply with any obligations assumed under a written warranty or service contract in writing subject to this title may bring suit for breach of such warranty or service contract in an appropriate district court of the United States subject to the jurisdictional requirements of

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the Senate approach, and the version of § 110 enacted into law was adopted substantially verbatim from the House bill, which had neither defined "express warranty" nor provided a cause of action for its breach.[11] The

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[10] *continued*

section 1331 of title 28, United States Code. Any purchaser damaged by the failure of a supplier to comply with any obligations assumed under an express or implied warranty or service contract subject to this title may bring suit in any State or District of Columbia court of competent jurisdiction. . . .

(c) Any purchaser who shall finally prevail in any suit or proceeding for breach of an express or implied warranty or service contract brought under section (b) of this section shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by such purchaser for or in connection with the institution and prosecution of such suit or proceeding, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(d) (1) For the purposes of this section, an "express warranty" is created as follows:

(A) Any affirmation of fact or promise made by a supplier to the purchaser which relates to a consumer product or service and becomes part of the basis of the bargain creates an express warranty that the consumer product or service shall conform to the affirmation or promise.

(B) Any description of a consumer product which is made part of the bargain creates an express warranty that the consumer product shall conform to the description.

119 Cong. Rec. 29491-92 (1973).

[11] The House version of § 110 provided in part:

[A] consumer who is damaged by the failure of a supplier to comply with any obligation under this title, or under a warranty or service contract (as defined in section 101(10) and (11)), may bring suit [in any state court of competent jurisdiction or in an appropriate federal district court].

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House version of the Act created instead a cause of action for failure to comply with "any obligation under [the Act], or under a warranty or service contract (as defined in section 10(10) and (11))."[12] The Conference Committee modified this language by substituting for the word "warranty," the term "written warranty," which the Conference Committee had newly defined in § 101(6).[13]

It is also significant to note that the limitations imposed on federal jurisdiction by the Senate version of § 110, which plaintiffs view as expansive, were actually stricter than those imposed by the House bill. The Senate bill did not create a cause of action cognizable in federal court for breach of express warranties; instead, it apparently operated only to provide for recovery of attorneys' fees by consumers who prevailed in actions for breach of express warranties in *state court*. And,

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[11] *continued*

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the institution and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

120 Cong. Rec. 31729 (1974).

[12] "Warranty" was defined in the House bill to include implied warranties as well as those warranties ultimately defined as "written warranties" in § 101(6). *See* note 19, *infra*.

[13] The House bill had not defined "written warranty," and the definition contained in the Senate bill was aptly described by the district court as a "lesson in statutory indirection." 500 F. Supp. at 1188 n.17. Section 101(8) of the Senate bill first defined a "[w]arranty in writing 'or written warranty'" as "a warranty in writing against defect or malfunction of a consumer product." Section 101(11) then defined "warranty in writing against defect or malfunction of a consumer product" in essentially the same way as the final version of the Act defined "written warranty." 119 Cong. Rec. 29490 (1974).

because it incorporated the $10,000 amount in controversy requirement of 28 U.S.C. § 1331 (1976), few, if any, actions could have been brought in federal court under the Senate version of the Act.[14] As the Report of the Senate Committee on Commerce explained:

> Subsection (b) authorizes any "consumer" . . . to sue for breach of warranty or service contract in an appropriate district court, but any such suit shall be subject to the jurisdictional requirements of section 1331 of title 28 of the United States Code. In effect, this means a person or at this time a class of persons must show individual damages of ten thousand dollars or more in order to bring suit in a Federal court.
>
> But any 'consumer' damaged by the failure of a supplier to comply with any obligations assumed under an express or implied warranty or service contract subject to this title—i.e. a warranty in writing, a service contract in writing, an express warranty . . . or implied warranties—may sue in any State or District of Columbia court of competent jurisdiction. Thus, for the most part, the Federal rights created by title I of this bill will be enforced in State rather than Federal courts.

S. Rep. No. 93-151, 93rd Cong., 1st Sess. 23 (1973).[15] Thus, although the Senate bill defined "express warran-

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[14] Under then-applicable law, for a proposed class action to have satisfied the amount in controversy requirement of 28 U.S.C. § 1331 (1976), each member of the class must have had an individual claim in excess of $10,000. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). It appears unlikely that either this proposed class action or the engine interchange class action would have met this stringent amount in controversy requirement. We note that Congress amended 28 U.S.C. § 1331 (1976) in 1980 to eliminate the minimum amount in controversy requirement. Pub. L. 96-486, § 2(a), 94 Stat. 2369 (1980).

[15] In contrast to the Senate version of § 110, the federal jurisdictional provision of the House bill, which was adopted by the Conference, required only that each individual claim be greater than $25, although the amount in controversy in

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ty" and in some manner created a federal claim for breach of such warranties, it limited the jurisdiction of *federal courts* to actions alleging breach of "written warranties," as that term was defined in § 101 of the Act.

Therefore, in arguing that § 110(d) provides consumers with a claim actionable in federal court for breach of any written express warranty, plaintiffs argue for a construction of § 110(d) that was not contemplated by either the House or the Senate.[16] It is inconceivable

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[15] *continued*
the aggregate must exceed $50,000. In addition, if the action is brought as a class action, at least 100 plaintiffs must be named. 15 U.S.C. § 2310(d)(3) (1976). The House Report stated that the purpose of these jurisdictional requirements "is to avoid trivial or insignificant actions being brought as class actions in the federal courts." H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. and Ad. News 7724. Absent these requirements, actions could have been brought in federal court under the Act without regard to the amount in controversy. *See* 28 U.S.C. § 1337 (1976); *Novasel v. Northway Motor Car Corp.*, 460 F. Supp. 541 (N.D.N.Y. 1978). Thus, the federal jurisdictional requirements of the Act, although less severe than those initially adopted by the Senate, evince an intent to limit the private remedy in federal court.

[16] The single legislative statement cited by plaintiffs which bears directly on the issue before us is found in a single paragraph of the House Conference Report:

> *Remedies for breach of express warranties not in writing*
>
> The Senate bill afforded reasonable attorney's fees to a consumer who successfully sued for the breach of an express oral warranty. The House amendment did not provide reasonable attorney's fees in that situation. The conferees adopted the House approach, but stated that they would reexamine the issue if oral express warranties became more prevalent.

Joint Explanatory Statements of the Committee of Conference, S. Conf. Rep. No. 93-1408 and H.R. Conf. Rep. 93-1606, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. and Ad. News 7755, 7758.

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that, by deleting any reference to "express warranty" from the Act, and by providing instead a cause of action for breach of "written warranty" (which the Conference Committee had newly defined in § 101(6)), the Committee could have meant to create a private remedy actionable in federal court for breach of all written express warranties, when neither the Senate nor the House had so provided.[17]

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[16] *continued*

Plaintiffs argue that this language indicates that "there was no intention of the Conference Committee to restrict the range of written representations actionable under Section 110(d)(1)." We disagree. The negative inference urged by plaintiffs is simply too attenuated to provide the clear evidence of contrary intent necessary to override the specific language of the statute. *See Zychinski v. Commissioner*, 506 F.2d 637, 639 (8th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975); *Luckman v. Commissioner*, 418 F.2d 381, 387 (7th Cir. 1969).

Moreover, this paragraph must be read in light of the fact that neither the Senate nor the House versions of § 110(d) had provided that all written express warranties would be actionable in federal court. The Senate bill had provided for recovery of attorneys' fees by consumers who prevailed in *state court* actions for breach of any express or implied warranty. The House bill, as the Conference Report correctly stated, did not provide attorneys' fees in actions for breach of oral express warranties. *See* note 11, *supra*. It would also have been correct for the Report to note that the House bill had created a federal cause of action and provided attorneys' fees only for consumers damaged by breach of those warranties defined in § 101(10) of the bill. *Id.* But the failure of the Report to so note does not support the conclusion that the Conference Committee, in adopting the House approach, intended to do something that neither the House nor the Senate had contemplated, i.e., create a cause of action cognizable in federal court for breach of any written express warranty.

[17] Plaintiffs have referred us to portions of an *amicus* brief filed with the court in the Engine Interchange Litigation by Senator Magnuson and Representative Moss. Of course, such post-passage remarks of legislators are of negligible value in ascertaining the intent of Congress in passing the Act. *Blanchette v. Conn. General Ins. Corp.*, 419 U.S. 102, 132 (1974). It is interesting to note, however, that the Act's spon-

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In sum, there is simply no substantial evidence in the legislative history that Congress intended to create a broad federal cause of action for breach of written express warranties. Rather, it appears that the draftsmen of § 110(d) intended to adopt the House approach, which was to create a federal private cause of action for consumers injured by the violation of (1) any obligation under the Act, (2) any warranty subject to the extensive regulatory requirements of the Act, or (3) any implied warranty—the deceptive and unconscionable limitation of which was a major focus of the Act's regulatory provisions.

IV.

Although the district court properly declined to adopt plaintiffs' interpretation of § 110(d), it also rejected GM's argument that the only written warranties actionable under § 110(d) are those promises, representations or undertakings defined as "written warranties" in § 101(6). In its view:

> Congress . . . indicated that although the Magnuson-Moss Act only regulates transactions involving written warranties as the term is narrowly defined in § 101(6), once a consumer is involved in such a transaction there is a policy of providing federal remedies beyond the four corners of the formal warranty.

500 F. Supp. at 1191. Thus, the district court concluded that, whenever a manufacturer elects to extend a

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[17] *continued*

sors, in urging that GM's undisclosed substitution of Chevrolet engines in Oldsmobile automobiles constituted a breach of a written warranty under § 110(d), did not argue that § 110(d) created a federal cause of action for breach of warranties of description (or other written express warranties not within the § 101(6) definition). Rather, they argued that the representations made by GM constituted "written warranties" within the meaning of § 101(6). The plaintiffs do not argue on appeal for such an interpretation under the similar circumstances of this case, and the district court specifically rejected such a construction. *See* note 7, *supra*.

"written warranty" to a consumer, "[o]ther written promises presented in connection with the same transaction should also be enforceable as part of the 'written warranty.'" 500 F. Supp. at 1190.

The district court's determination that "written warranty" in § 110(d) means something more than it was defined to mean in § 101(6) has two aspects. First, the court found that the "Act itself suggests several different possible meanings of the phrase 'written warranty'" and is therefore ambiguous. 500 F. Supp. at 1187. Second, because of this ambiguity, the district court looked to the purposes of the Act, as derived from its legislative history, and concluded that § 110(d) should be construed to provide "a remedy for all written promises presented in connection with the sale of a formally warranted product." 500 F. Supp. at 1190.

We believe that the three ambiguities identified by the district court, which we shall consider individually, are not sufficiently real or substantial to warrant rejection of the definition of "written warranty" provided by Congress in the Act. Moreover, as already discussed, we do not find in the Act's legislative history a clear Congressional intention that the term "written warranty" was meant to have different meanings in different sections of the Act. *See* Part III, *supra*. And, if anything is apparent from the statutory scheme, it is the importance of providing a clear, carefully circumscribed meaning to the term "written warranty." *See* note 7, *supra*.

One ambiguity in the use of the term "written warranty" which was identified by the district court appears in § 103(b). That subsection provides that the Act's content and disclosure requirements "shall not apply to statements or representations which are similar to expressions of general policy concerning consumer satisfaction and which are not subject to any specific limitations." 15 U.S.C. § 2303(b) (1976). The district court concluded that this provision would be "unnecessary" if the § 101(6) definition was intended to apply throughout the Act, presumably because, in the view of the district court, the generalized represen-

tations described in § 103(b) could never fall within the § 101(6) definition and were therefore statements or representations of a sort other than those defined in § 101(6). We cannot accept this supposition, however, because it is possible to construe these generalized representations to fit within the § 101(6) definition in some cases. For example, a written statement that "your money will be refunded if you are not completely satisfied" might be deemed to constitute an "undertaking in writing in connection with the sale by a supplier of a consumer product to refund . . . in the event that such product fails to meet the specifications set forth in the undertaking," *i.e.*, complete satisfaction. 15 U.S.C. § 2301(6)(B) (1976). Section 103(b) may quite plausibly have been included in the Act precisely to foreclose such interpretations.[18]

A second ambiguity identified by the district court concerns § 110(c)(2)(B), which provides that a "deceptive warranty" includes a "written warranty created by the use of such terms as 'guaranty' or 'warranty,' if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual." 15 U.S.C. § 2310(c)(2)(B) (1976). The district court concluded that this "apparently" means that "a written warranty can be 'created' by the use or misuse of the words 'guaranty' or 'warranty,' even if the document using these terms does not include representations which constitute warranties under § 101(6)." 500 F. Supp. at 1187-88. Although the district court offers a sensible reading of § 110(c)(2)(B), its interpretation is not by any means required by the language of that section, and the

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[18] In its regulations, the FTC describes § 103(b) as creating an "exemption" from the requirements of §§ 102-104. 16 C.F.R. § 700.5(b) (1980). This description strongly suggests that the FTC also perceives that at least some of the generalized statements exempted by § 102(b) might otherwise fall within the § 101(6) definition, since the same regulation unambiguously states that the duties and liabilities of the Act are imposed only on those suppliers who offer "written warranties" as defined in § 101(6). *See* 16 C.F.R. § 700.3(a) (1980) (quoted in note 6, *supra*).

interpretation is without support in the legislative history. The deceptive warranty provision was taken largely verbatim from the House version of the Act, which defined "deceptive warranty" to mean, *inter alia*, "a warranty (as so defined [in section 101(10)])[19] created by the use of such terms as 'guaranty' or 'warranty' . . ." Thus, while the draftsmen's diction may have been suspect (insofar as they used the phrase "created by the use of" instead of "including" or "containing"), it appears most plausible that they intended for the term "deceptive warranty" to mean a written warranty *as defined in § 101(6)*, which contains such terms as "guaranty" or "warranty," if the warranty's terms and conditions "so limit its scope and application as to deceive a reasonable individual." 15 U.S.C. § 2310(d) (1976). *See also* C. Reitz, Consumer Protection Under the Magnuson-Moss Warranty Act 77 (1978).

The district court also found an inconsistency between the § 101(6) definition of "written warranty" as a particular type of promise, affirmation or undertaking, and § 102, which "authorizes the Federal Trade Commission to promulgate rules requiring 'inclusion *in the written warranty*' of various explanations of the rights of the

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[19] Section 101(10) of the House version of the Act defined "warranty" to mean:

> (A)(i) any written affirmation of fact or written promise made at the time of sale by a supplier to a purchaser which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (ii) any undertaking in writing in connection with the sale of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and the first buyer at retail of such product; or
>
> (B) an implied warranty arising under State law.

120 Cong. Rec. 31727 (1974).

consumer, including such statements as a 'brief, general description of the legal remedies available to the consumer.'" 500 F. Supp. at 1187 (emphasis in original). From this, the district court concluded that "in the written warranty" suggests that "[a] written warranty is not just a particular type of 'promise' or 'affirmation' but a type of document or written contract as well." *Id.* In its brief on appeal, GM similarly stated that a "'written warranty' can be both a particular type of written promise or affirmation *and* the document incorporating it."

The text of a "written warranty" must, in the nature of things, be written *on* something. And, to this extent, a written warranty as defined in § 101(6) might be described as a written document. But there is nothing in the scheme of the statute to suggest that the Act was intended to apply to any promises, affirmations or undertakings other than those defined as written warranties in § 101(6). And we ought not to take a leap of faith to a documentary definition allegedly suggested by the seemingly inapt phrasing of § 102. As already noted, it is apparent from the statutory scheme that "written warranty" should be accorded a single, precise meaning. Moreover, we are constrained by sensible rules of statutory construction to interpret the phrase "written warranty" in § 102, as in the other sections of the statute, to be consistent with the clear meaning given to it by § 101(6). As stated in *United States v. Gertz*, 249 F.2d 662, 665 (9th Cir. 1957):

> [W]here the same word or phrase is used in different parts of a statute, it will be presumed, in the absence of anything clearly indicating a contrary intent, that the word or phrase is used in the same sense throughout. Under circumstances giving application to this rule, there is a corollary that, where the meaning of the word or phrase in one instance is clear, this meaning will be attached to it elsewhere.

Accord, Hotel Equities Corp. v. Commissioner, 546 F.2d 725, 728 (7th Cir. 1976); *Dragstrem v. Obermeyer*, 549 F.2d 20, 24 n.4 (7th Cir. 1977). *See also Nachman Corp.*

v. Pension Benefit Guaranty Corp., 592 F.2d 947, 952-53 n.6 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980).

There is no clear evidence that Congress intended for written warranty in § 102 to mean something different than the definition it ascribed to the term in § 101(6), and we consequently presume that Congress intended for "written warranty" to have the same meaning in both sections. We therefore decline to accept the position that "written warranty" means both a particular class of representations and some undefined "document" containing those representations. It is more appropriate to read the inconsistent phrase "inclusion *in* the written warranty" [emphasis supplied] to mean "inclusion *with* the written warranty" or "inclusion in *the document containing* the written warranty."[20]

The term "written warranty" serves a central function in the Act of identifying the particular representations that are subject to the Act's disclosure and content requirements. Because of the function it serves, it is important that the term have a single, precise meaning. The § 101(6) definition provides that unambiguous meaning, and that definition is used (all things considered) with commendable aptness by the draftsmen in the forty-odd appearances of the term "written warranty" in every section of the Act. We cannot agree that syntactical slips such as the use of the preposition "in" in § 102, create ambiguities in the statutory scheme of sufficient weight to justify discarding the meticulously worded definition of "written warranty" in § 101(6) in favor of an undefined "document," or "pile of written documents,"

[20] The regulation adopted by the FTC pursuant to § 102 supports this construction, since it requires clear and conspicuous disclosure "in a single document" (in contrast to "in the written warranty") of the items of information required by § 102. *See* note 4, *supra*. Similarly, in defining "on the face of the warranty," the FTC distinguished between the "text of the warranty" and the document containing it. *See* note 5, *supra*.

as urged by the district court. *See* 500 F. Supp. at 1190.[21]

V.

In sum, we are constrained to interpret "written warranty" in § 110(d) in accordance with the definition of "written warranty" provided by Congress in § 101(6).

REVERSED.

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[21] Moreover, the legislative history of the Act, which the district court describes as "puzzling," 500 F. Supp. at 1188, offers no basis for the district court's rejection of the § 101(6) definition. Most of the very general legislative statements cited by the district court were made in reference to the Senate version of § 110, which, as set forth above, provided attorneys' fees for consumers who prevailed in state court actions for breach of any express or implied warranty. *See* Part III, *supra*. There is simply no clear evidence that Congress, in enacting the House version of § 110(d), intended to create a federal claim for breach of representations not within the § 101(6) definition of "written warranty."

The reports and proceedings of legislative bodies unquestionably lend themselves to the imagery of archaeology. But for better or worse, the papyrus scrolls or cuneiform tablets which survive such proceedings must count for more than the odd-shaped rocks, human skulls and miscellaneous artifacts scattered around the site. In its "archaeological dig" into legislative history, the district court tended to overlook the obvious but prosaic in favor of exotic "ambiguities" attributable more easily to drafting fatigue than to confusion of purpose.

WOOD, *Circuit Judge*, dissenting. This is a close case of statutory interpretation, but I respectfully dissent from the majority's conclusion that the Act must be so strictly and rigidly read as to exclude coverage of the alleged transmission substitution by General Motors.

Judge Moran, in the trial court, carefully pondered the arguments and concluded that the act was broader than General Motors argued, but not so broad as plaintiffs' urged.[1] I generally agree with his interpretation.

As Judge Moran noted, 500 F. Supp. at 1184, he was not the first one to have some difficulty interpreting the Act. Others before him have characterized it as serving as no exemplar of legislative clarity. I would, therefore, not begin and end by viewing the Act's definition provisions in such isolation as to conclude that the beneficial consumer protection purposes of the Act are thereby completely limited. Were this a criminal statute, I might be bound to resolve the question in favor of General Motors, but it is not.

This Act needs some limited judicial first aid in order to be able to accomplish its remedial purposes.[2]

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[1] Judge Moran's decision is reported at 500 F. Supp. 1181 (N.D. Ill. 1980).

[2] *See United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940): "[E]ven when the plain meaning [of the statute] did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (Footnotes omitted.) For one of the earliest statements of the applicable principles of statutory construction, *see Heydon's Case*, 30 Co. 7a, 76 Eng. Rep. 637 (Exchequer 1584): "[F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) [among the] four things [which] are to be discerned and considered [is]: . . . 4th. The true reason of the remedy, and then the office of all the Judges is always to make such construction as shall suppress the mischief [at which the statute is aimed], and advance the remedy, and *to suppress subtle inventions and evasions for continuance of the mischief* . . . and to add force

(Footnote continued on following page)

Therefore, I would interpret the Act to mean that those written documents of General Motors which made specific representations of substance about the product, not just advertising ballyhoo, and which were introduced by General Motors into the transaction became, as a practical matter, inferentially incorporated into the written warranty. The written warranty would then more fully deserve its gold filigree frame.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] *continued*
and life *to the cure and remedy*, according to the true intent of the makers of the Act. . . ." (Emphasis added.) *See generally* W. HURST, STATUTES IN COURT 142, 184-201 (1970).

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, JR., C.G. HASKINS, EUGENE G. COLEMAN, et al.,	)	
Plaintiffs,	)	No. 79 C 1243
vs.	)	
GENERAL MOTORS CORPORATION,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiffs, purchasers of General Motors Corporation (GM) automobiles, seek relief under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Magnuson-Moss Act or Act), 15 U.S.C. §2301 et seq., because of the alleged undisclosed substitution of THM 200 (M29) transmissions for THM 350 (M38) transmissions in various 1976 through 1979 models of GM automobiles. Plaintiffs claim that the THM 200 transmission is inferior to the THM 350 and that the substitution has caused violations of written warranty, implied warranty and deceptive warranty provisions of the ACT. GM has moved to dismiss the second amended complaint for failure

to state a claim upon which relief can be granted.[1]

The complaint alleges that GM has disseminated "brochures, manuals, consumer advertising and other forms of communication" which "expressly represented and warranted" that certain GM automobiles contained "THM 350 . . . transmissions, or transmissions of similar quality and performance . . . and that they would meet a specified level of performance." Through such communications, GM "implied, warranted and represented" that those models contained such transmissions. Plaintiffs in Count I charge violation of the written warranty and, apparently, implied warranty provisions of the Magnuson-Moss Act. In Count II, plaintiffs claim that

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[1]This case is related in certain respects to the much-publicized "engine interchange" litigation, which has been before the court of appeals in this circuit on two different occasions. See In Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979); Oswald v. McGarr, F.2d (7th Cir. No. 79-1819, April 11, 1980). The questions here presented were not considered there.

the substitution is actionable as a deceptive warranty within the meaning of § 110(c)(2) of the Act 15 U.S.C. § 2310(c)(2).

The court concludes that there is no private right of action under § 110(c)(2) and that the complaint does not state a claim for breach of an implied warranty. Count I, however, liberally construed, does state a claim for violation of written warranty under § 110(d) of the Act. Federal jurisdiction requires a sales transaction which includes a written warranty within the express statutory terms, but the representations made to purchasers in conjunction with such a warranty are actionable under federal law. The reach of federal law is not to representations made in the market generally but to representations made to purchasers of consumer goods in conjunction with a sales transaction of which the furnishing of a written warranty, as statutorily defined, is an integral part. Accordingly, the motion is denied as to Count I, and Count II is dismissed.

A literal reading of the Magnuson-Moss Act is only a departure point for giving meaningful content to the statute which has been variously described as "dissappointing",[2] "opaque",[3] and a product of "poor drafting".[4] A review of the legislative history gives but limited solace. That review is the legal equivalent of an archeological dig. Various consumer warranty bills were pending before the House and Senate for four years, during which each body defined, discarded, reintroduced and redefined concepts which in some fashion or another are related to the enacted legislation. Some provisions in the Act are vestigial reminders of concepts buried

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[2]Eddy, Effects of the Magnuson-Moss Act Upon Consumer Products Warranties, 55 North Car. L. Rev. 835, 877 (1977) [hereinafter "Eddy"].

[3]Emerging Issues Under the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, 45 Antitrust L.J. 72, 90 (1976) [hereinafter "Seminar"].

[4]Schroeder, Private Actions Under the Magnuson-Moss Warranty Act, 66 Cal. L. Rev. 1, 3 (1978) [hereinafter "Schroeder"].

but not totally forgotten during the on-going legislative process. Both proponents and opponents of an expansive interpretation have cited compelling, to them, legislative history only dimly related to the language which finally emerged as law.

Any consideration of the questions presented must begin, then, with the Supreme Court's admonition that "[s]tatutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235, 250 (1970).[5]

I. WRITTEN WARRANTIES

The genesis of the Act was Congressional concern about the adequacy of warranty protection for automobile

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[5]See F.T.C. v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968) (Court interprets statute while conceding it is "by no means . . . an exemplar of legislative clarity"). See generally L. Hand, The Bill of Rights at 19-30; Friendly, The Gap in Lawmaking--Judges Who Can't and Legislators Who Won't, 63 Colum. L. Rev. 787 (1963).

purchasers, documented by FTC investigations in 1968 and 1980. See H. Rep. No. 93-1107, reprinted in 1974 U.S. Code Cong. and Admin. News 7702, 7708-9. The hypothetical consumer had purchased a defective automobile, possessed an impressive warranty document, and had but little hope of real relief. That concern led to a legislative effort to provide meaningful warranty protection for consumers in a mass marketing economy. A consistent concept in the Act and its legislative history, akin to that in the securities laws, is that full disclosure will result in informed choices or at least that the reach of federal action should mandate full disclosure so as to permit informed choice. See Eddy, Effects of the Magnuson-Moss Act upon Consumer Product Warranties, 55 North Car. L.Rev. 835, 874 (1977). The history of the Act was, if not shaped, profoundly influenced by the inadequacies of the familiar formal consumer warranty, after described as "the paper with the filigree border."[6]

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[6]H. Rep. No. 13-1107, supra, 1974 U.S. Code Cong. and Admin. News at 7703.

Equally apparent from the Act and its legislative history is the Congressional reluctance to sanction a sweeping preemption of the law of commercial transactions traditionally the preserve of each of the fifty states but in a sense federalized by the widespread enactment of the Uniform Commercial Code. The Magnuson-Moss Act is not a federal "truth in advertising" law. It has its essential purpose truth in express warranty disclosure, but both in language and legislative history it recognizes that what is in the paper with the filigree border cannot be wholly divorced from what has influenced the consumer in a mass marketing economy. What then is now a federal claim and what is the traditional state lawsuit based upon the Uniform Commercial Code?

The key to understanding the scope and effect of the Magnuson-Moss Act is interpreting the phrase "written warranty", which appears at several different places in the statute with somewhat different meanings. The Act initially defines a written warranty as:

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6). As with the Uniform Commercial Code,[7] a written warranty under this definition is a

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[7]Section 2-313 of the Uniform Commercial Code describes express warranties as follows:

> Express Warranties by Affirmation, Promise, Description, Sample
>
> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the

specific type of "affirmation", "promise", or "undertaking", though the Act's definition is substantially narrower than the Code's.

A written description of the size or type of a transmission does not constitute a written warranty as defined by this section. The plaintiffs attempt to fit such promise under subsection (A) of this section,

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(Continued from preceding page)

goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. 1961, July 31, Laws 1961, p. 2102, § 2-313.

contending that it "relates to the nature of the material or workmanship and affirms or promises that such material or workmanship . . . will meet a specified level of performance." However, the plaintiffs ignore the requirement that the promise of a "specified level of Performance" must be "over a specified period of time." To constitute a written warranty under this provision a warranty must be limited in duration; a representation, for example, that a transmission will perform adequately for three years would constitute a written warranty,[8] but not simply a statement that an automobile contains a certain type of transmission.

The Federal Trade Commission supports this construction:

> The Act imposes specified duties and liabilities on suppliers who offer written warranties on consumer products. Certain representations, such as energy efficiency ratings for electrical appliances, care labeling of wearing apparel, and other product

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[8]The representation would also have to be made "in connection with the sale" and would have to become "part of the basis of the bargain" to constitute a written warranty under this section of the statute. 15 U.S.C. 2301(6). See Schroeder, supra n. 4, at 14-16.

> information disclosures may be express warranties under the Uniform Commerical Code. However, these disclosures alone are not written warranties under the Act. Section 101(6) provides that a written affirmation of fact or a written promise of a specified level of performance must relate to a specified period of time in order to be considered a 'written warranty.' A product information disclosure without a specified time period to which the disclosure relates is therefore not a written warranty. [9]

16 C.F.R. § 700.3 (1980). Therefore, according to both the text of the statute and the interpretation of the agency charged with its enforcement, the plaintiffs assertion that all written representations which would be express warranties under the Uniform Commercial Code

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[9]Plaintiffs make much of the fact that the Federal Trade Commission has initiated proceedings against GM because of the alleged transmission switch. It is noteworthy that the Commission is proceeding under its general powers to investigate and to provide relief from deceptive practices under the Federal Trade Commission Act, not under the Magnuson-Moss Act.

constitute written warranties under the Magnuson-Moss Act is mistaken.[10]

To the extent that the plaintiffs rely on broad promises or representations distributed to the general public through advertising, the complaint also fails to plead the existence of a written warranty under § 101(6). Several provisions in the Magnuson-Moss Act strongly suggest that descriptions of products contained in general advertising are generally not written warranties within the meaning of § 101(6). Section 103 of the Act, for example, requires that every written warranty conspicuously disclose whether it is "full" or "limited" as those terms are defined by the Act. 15 U.S.C. §2302. Congress certainly did not include a conspicuous heading stating whether it is "full" or "limited"--in fact, the terms do not make sense as applied to most advertising.

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[10]See Eddy, supra n. 1, at 853-54; Note, Consumer Product Warranties Under the Magnuson-Moss Warranty Act and the Uniform Commercial Code, 62 Cornell L. Rev. 738, 744-46 (1977). Interestingly, if GM had represented that the transmission would perform like a THM 350 transmission for the life of the transmission:, there is little question that such a statement would constitute a warranty under § 101(6).

See 15 U.S.C. §2304. The regulations conclude, simply:

> The Commission encourages the disclosure product information which is not deceptive and which may benefit consumers, and will not construe the Act to impede information disclosures in product advertising or labeling.

16 C.F.R. § 700.3 (1980). The fact that a manufacturer has distributed written advertisements describing his products does not make him a "warrantor" under the Act, nor does it trigger the Act's extensive regulatory scheme designed for more formal warranties. The plaintiff's complaint, because it fails to distinguish between descriptions of transmissions in general advertising and time-bound promises presented in connection with the sale of specific cars, pleads more than a breach of a written warranty under the literal terms of §§ 101(6) and 110(d)(1).[11]

GM contends that analysis of this case should end at this point, that the statute means what it says when it defines written warranties, and that state law

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[11] It is not clear whether all advertising is exempt from the definition of "written warranty" in § 101(6). The definition requires that an "affirmation of fact or written promise" must be made "in connection with the sale of a consumer product" to be a written warranty. An earlier version of the Act defined written warranty

provides the exclusive remedy for breaches of express warranties which do not fulfill the requirements of § 101(6). If the Act itself consistently adhered to the narrow definition of written warranty in § 101(6), this argument might be persuasive. GM is correct that a transaction must involve some representations constituting written warranties under § 101(6) to be covered by the Act. Its claim that the Act provides a cause of action only for breaches of such representations, however, fails to take into account ambiguities in the statute or adequately to explain its legislative history and the range of consumer problems it was designed to address.

The Act itself suggests several different possible meanings of the phOase "written warranty". The definition in § 101(6) is, by itself, relative clear. As discussed

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in terms of representations made "at the time of sale." S.Rep. 356, 93d Cong. 1st Sess., § 101(11) 1973), 119 Cong. Rec. 969. There is some suggestion in the legislative history and Federal Trade Commission treatment of other sections of the statute that at the very least a formal warranty presented in newspapers or other advertising is covered by the Act if it meets the other requirements of § 101(6). See Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 93-1408 and H.R. Conf. Rep. 93-1606, 93d Cong, 2d Sess. (1974), 1974 U.S. Code Cong. and Admin. News 7755, 7759-60. See generally Schroeder, supra n. 4, at 14-16 & n. 79.

above, a written warranty under subsection (A) of § 101(6) is a particular type of "affirmation" or "promise". Other provisions of the Act, however, do not employ this definition. For example, the next section of the statute implies that a written warranty is not a particular type of promise or affirmation, but rather a document containing such representatons along with others. Section 102 authorizes the Federal Trade Commission to promulgate rules requiring "inclusion in the written warranty" of various explanations of the rights of the consumer, including such statements as a "brief, general description of the legal remedies available to the consumer." 15 U.S.C. §2302(a). A description of the legal status of the consumer is not a written warranty under the narrow definition of § 101(6), but Congress apparently intended, if a warranty distorts or fails to comply with such a description which has been included in a document also containing § 101(6) warranties, that this failure would be actionable as a breach of a written warranty. A written warranty is not just a particular type of "promise" or "affirmation" but a type of document or written contract as well.

This second definition of written warranty flows from the typical transaction which Congress had in mind in passing the Magnuson-Moss Act, in which the consumer receives "the paper with the filigree border bearing the bold caption 'Warranty' or 'Guarantee'." H.Rep. No. 13-1107 [sic] on H.R. 7917, 93d Cong. 2d Sess. (1974), 1974 U.S. Code Cong. & Admin. News 7702, 7708. A formal warranty of this kind is not the only type of written warranty covered by the Act, but the regulatory scheme suggested by §§ 102-104, which the Federal Trade Commission has developed in more detail, is directed largely at such documents.[12] If formal, written warranties were all that Congress had in mind in permitting private suits for breach of written warranties, then GM would be mistaken in arguing that a description of the size of a transmission is never actionable under the Act. Instead, this case would turn on whether the representation was made in a formal warranty or in written documents which could fairly be construed as part of a formal warranty. One

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[12]See 16 C.F.R. §701.1(i) (1980) (defines the phase "on the face of the warranty", and clearly indicates that a warranty is a type of document, at least for purposes of the disclosure provisions of the regulations); FTC Staff Explains Details of Magnuson-Moss Warranty Act, Anti-trust & Trade Reg. Rep. (BNA) at F-2 & F-5 (1976).

questions what the position of GM might be if its "filigree border" warranty stated that the automobile possessed a THM 350 transmission which was defect free and was warranted for a stated time or number of miles, when in fact the automobile had a different and substantially inferior mechanism which could, however, be expected to operate with reasonable efficiency through, but not much beyond, the warranty period.

Other sections of the statute create additional ambiguities. Section 110(c)(2)(b), for example, defines a "deceptive warranty" as a "written warranty created by the use of such terms as 'guaranty' or 'warranty', if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual." 15 U.S.C. §2310(c)(2)(B). Apparently, a written warranty can be "created" by the use or misuse of the words "guaranty" or "warranty", even if the document using these terms does not include representations which constitute warranties under

§ 101(6).[13] Section 103(b) of the Act adds further to the confusion by stating that the sections of the statute regulating the contents of written warranties should not be interpreted to apply "to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations". 15 U.S.C. § 2303(b). If GM's narrow definition of written warranties were correct, this provision would be unnecessary; yet the text and the legislative history of this section indicate a substantial concern with the possibility that broad representations such as "satisfaction guaranteed or your money back" would constitute written warranties under the Act. See H. Rep. 93-1107, supra, 1974 (U.S. Code Cong. & Admin. News at 7719.[14] Congress must have anticipated in certain circumstances that written representations having little connection with documents containing § 101(6) warranties might still be covered by the Act.

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[13]The Federal Trade Commission has adopted this interpretation. See Schroeder, supra n. 4, at 9, and materials cited.

[14]See also S.Rep. No. 93-151 on S. 356, 93d Cong., 1st Sess. (1973) at 17; Seminar, supra n. 3, at 94-95.

If the statute itself reflects some confusion over the meaning of the phrase "written warranty", the legislative history is even more puzzling. Throughout many of the Congressional hearings and floor debates on proposed versions of the Act, the legislators assumed that there were two types of express warranties: oral and written.[15] The discussion indicated little awareness that the statute on its face regulated only a narrow range of written, express warranties as the term is used in the Uniform Commercial

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[15]See, e.g., Hearings Before the Subcommittee on Commerce & Finance of the House Committee on Interstate and Foreign Commerce, 93d Cong., 1st Sess. at 116, 168-69 & 321-24; 119 Cong. Rec. 29485 (1973) (discussing proposed amendment to the bill, Rep. Moss implied that the principal distinction in the Act is between express warranties which are oral and those which are in writing; no indication appears there that only a narrow range of express warranties under the Uniform Commercial Code which are in writing actually constitute written warranties under the Act); Joint Explanatory Statement of the Committee of Conference, supra, 1974 U.S. Cong. & Admin. News at 7758. This ambiguity in the statute and the legislative history apparently led some commentators to believe that all express warranties which are in writing are covered by the private remedy sections of the Act. See, e.g., Smith, The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor, 13 Cal. Western L. Rev. 391, 421 (1977).

Code.[16] Some of this confusion probably resulted from the fact that earlier forms of the statute, including the version first passed by the Senate, contained a separate provision for breach of express warranties generally. See S. 356, 119 Cong. Rec29491 (1973). Express warranties and implied warranties were treated together in these earlier bills, whose principal effect was to authorize awards of costs and expenses, including attorney's fees, to consumers who "prevail[ed] in any suit or proceeding for breach of an express or implied warranty . . ." Id.[17] The bills mirrored the definition of express warranties in § 2-313 of the Uniform

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[16]At other times the legislators focused on problems relating to formal warranties, but again often failed to indicate that § 101(6) in its face includes many representations not necessarily contained in formal warranties, and excludes some documents "with the filigree border." H. Rep. No. 13-1107, supra, 1974 U.S. Code Cong. & Admin. News at 7703.

[17]Though the bill appeared to provide a federal right to sue for breach of express and implied warranties, the purchaser of a consumer product could only bring such suits in state courts. S. 356, § 110(b), 119 Cong. Rec. 29491 (1973). The net effect of these sections of the statute, therefore, flowed largely from the provisions for costs, expenses and attorneys' fees.

The definition of written warranty contained in this bill was a lesson in statutory indirection. The bill first

Commercial Code,[18] including the Code's provision that any "description of a consumer product which is made part of the bargain creates an express warranty that the consumer product shall conform to that description." Id.

The House rejected this approach and adopted a version of the Act which deleted any reference to express warranties, though retaining a cause of action for breach of implied warranties. The Conference Committee endorsed the House version of the bill. However, the Committee believed that in rejecting the Senate bill it only prevented attorney's fees awards for breaches of oral warranties. The Committee report explained:

> The Senate bill afforded reasonable attorney's fees to a consumer who successfully sued for the breach of an express oral warranty. The House amendment did not provide reasonable attorney's fees in that situation

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defined a "warranty in writing" or "written warranty" as a "warranty in writing against defect or malfunction of a consumer product." It then defined a "warranty in writing against defect or malfunction of a consumer product" in essentially the same way as the final version of the Act defined "written warranty". Id. §§ 101(10) & 101(11).

[18]See supra, n. 7.

> The conferees adopted the House approach, but stated that they would reexamine the issue if oral warranties became more prevalent.

Joint Explanatory Statement of the Committee of Conference, supra, 1974 U.S. Code Cong. & Admin. News at 7758. The Conference Committee approached the express warranty provisions of the Senate bill as applying only to oral, express warranties, apparently assuming that the private remedy for breach of "written warranties" already adequately covered the field of written, express warranties as defined by the Uniform Commercial Code. House subcommittee hearings discussing this issue also support this conclusion: the intent of the House in eliminating the Senate remedies for breach of express warranties was largely to avoid the difficult problems and factual uncertainties of proof and liability connected with oral warranties, not to restrict the range of written representations protected by the Act.[19] The statute thus contains yet another ambiguity--the phrase

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[19]See, e.g., Hearings Before the Subcommittee on Commerce & Finance, supra n. 15, at 116, 168-9, 319-21 & 329. Use of the term "alone" in the regulations adopted by the FTC also supports this court's interpretation of the Act. 16 C.R.F. §700.3 (1980) (quoted supra).

written warranty as used in §110(d) of the Act, authorizing private suits for breach of warranties, is apparently intended to have a broader scope than that suggested by the definition in §101(6).

Resolving these ambiguities requires examining the purposes of the Magnuson-Moss Act and attempting to interpret the statute as a whole. Senator Magnuson suggested four problems the statute was designed to address when he introduced it to the Senate. First, he stated, the statute was "designed to promote consumer understanding. Far too frequently there is a paucity of information supplied to the consumer about what in fact is offered him in that piece of paper proudly labeled 'warranty.'" 119 Cong. Rec. 968 (1973). Second, he continued, "there is a great need to insure certain basic protection for consumers purchasing consumer products which have written warranties," and in particular to deter "the disclaimer of implied warranties when the supplier of a consumer product guarantees his products in writing." Third, because "enforcement of a warranty through the courts is prohibitively expensive, there exists no currently

available remedy for consumers to enforce warranty performance." The statute attempts to remedy that problem in part by "providing reasonable attorneys' fees and court costs to successful consumer litigants." Fourth, he concluded there is a "need to stimulate the production of more reliable products," by requiring clear disclosure of what the warrantor is promising, so that a consumer can get some idea of the quality of products by examining the scope and duration of these written promises. Id.[20]

Two guiding principles emerge from the legislative discussion of the Act. The statute was not designed completely to supplant the state law of warranties and sales, but rather was intended primarily to regulate transactions involving written, usually formal, warranties

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[20]The Act has been described as adopting essentially a "disclosure approach" to the problems associated with written warranties. Under this approach, the theory is "the market will unerringly correct the abuse without the need for direct intervention", if honest disclosures of the scope and effect of warranties are required. Eddy, supra n. 2, at 874.

under the narrow definition of §101(6).[21] Further, in such transactions the Act not only regulates the contents and effect of the warranty document itself, but is also designed to provide a basic level of honesty and reliability to the entire transaction. Therefore, the Act requires certain written represetnations, generally the "paper with the filigree border", which trigger the Act's protections. Other written promises presented in connection with the same transaction should also be enforceable as part of the "written warranty."[22]

Any other result would be contrary to the goals of the statute to "promote consumer understanding"

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[21]The protections of the Act may also be triggered by the use or misuse of the words "warranty" or "guaranty". See text and note at n. 12, supra.

[22]This Court is not unmindful that allegations of representations made in advertising to consumers generally, which may rise to the level of express warranties under state law, may lead to pendent jurisdiction claims in a Magnuson-Moss action. Those do not, however, invoke federal question jurisdiction under the Act.

and "insure certain basic protection for consumers purchasing consumer products which have written warranties." 119 Cong. Rec. 968, quoted supra. In a typical automobile sale, a purchaser receives a pile of written documents. A formal warranty can be presented along with, or even contained inside, a brochure or manual.[23] As part of the same transaction, the purchaser may examine the sticker or label on the automobile and other printed material supplied in connection with the sale transaction. There is little reason to believe that a purchaser will distinguish between written representations made in the formal warranty and those made in the accompanying material.[24] If a warrantor describes in the sales literature the type of transmission he is selling and states in

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[23]See Antitrust & Trade Reg. Rep (BNA), supra n. 12, at F-5; 16 C.F.R. §701.1 (1980); Schroeder, supra n. 4, at 15.

[24]See Antitrust & Trade Reg. Rep. (BNA), supra n. 12, at F-5 (regulations permit printing a formal warranty "in a use and care manual, or directly on the product itself."); Schroeder, supra n. 4, at 15 ("When the manufacturer expressly gives a written warranty intended to run with the product to the consumer, as

the text of a formal warranty that the quality of the transmission is warranted for a particular time, the effect on the consumer will likely be the same as if the warrantor includes the description in the formal warranty document.[25] There is nothing in the legislative history of the Act to suggest that Congress intended this kind of artificial distinction to determine the rights and remedies of the consumer.

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in the case of an express warranty contained in an instruction manual, there should be no problem in recognizing the right of the consumer to enforce the warranty.")

Under state law, the formal warranty in such a transaction may be considered part of the same written contract, and even part of the same document, as the brochure or manual for purposes of the parol evidence rule or the statute of frauds. See U.C.C. §§2-201; 2-202. There is therefore no principled reason under state law to limit a written warranty to the "paper with the filigree border".

[25]Apparently following this type of reasoning, the court of appeals in the "engine interchange" litigation noted, simply, that "the transmissions were not those warranted", and implied that whehter such a representation was contained in the formal warranty was irrelevant. In Re General Motors Corp. Engine Interchange Litigation, supra, 594 F.2d at 1132 n. 44.

Construing the Act as providing a remedy for all written promises presented in connection with the sale of a formally warranted product avoids arbitrary distinctions between state and federal remedies. This interpretation is also consistent with the policy suggested by the statute's treatment of implied warranties. The original purpose of regulating implied warranties under the Act was to prevent the practice of warrantors giving consumers written warranties which, although appearing to promise the moon, actually had the effect of diminishing their legal rights by disclaiming implied warranties. Section 108 of the Act responds to this problem by restricting the legal effect of these disclaimers. 15 U.S.C. §2308.[26] But Congress did not simply modify state law in this

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[26]Section 2308 provides:

> (a) Where written warranty is made or service contract is entered into. No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

respect; instead, section 110 of the Act creates a broad federal cause of action for breach of implied warranties, at least for consumers who receive written warranties. 15 U.S.C. §2301(d)(1).[27] The purpose of this provision is to "insure a certain basic protection for consumers purchasing consumer rpoducts which have written warranties." 119 Cong. Rec. 968 (1973). Congress, therefore, indicated that although the Magnuson-Moss Act only regulates transactions involving written warranties

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> (b) Where implied warranties are limited in duration of written warranty. For purposes of this title (other than section 104(a)(2) implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.
>
> (c) Violative disclaimer, modification, or limitation ineffective. A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title and State law.

[27]This section appears to authorize awards of attorneys' fees to any "consumer who is damaged by any supplier . . . to comply with any obligation under . . . an implied warranty." However, the legislative history of this provision suggests that such awards might be limited to consumers who also received written warranties as defined by §101(6). See H. Rep. No. 93-1107, supra, U.S. Code Cong. & Admin. News at 7722; 119 Cong. Rec. 968 (1973) (statement of Sen. Magnuson).

as the term is narrowly defined in §101(6), once a consumer is involved in such a transaction there is a policy of providing federal remedies beyond the four corners of the formal warranty. Permitting a consumer to sue a warrantor for violating any written representations made in connection with the sale of the same product which is covered by a formal warranty furthers this goal. A narrower reading of the Act would elevate form over substance and would frustrate the purpose of the legislature.

II. IMPLIED WARRANTIES

The Magnuson-Moss Act authorizes private actions by "consumers" who are "damaged by the failure of a supplier, warrantor or service contractor to comply with" an implied warranty. 15 U.S.C. §2310. The Act looks to state law to determine the scope of implied warranties. 15 U.S.C. §2301(7). As the defendant points out, the implied warranty at issue in this case is the implied warranty of merchantibility contained in U.S.C.

§2-314.[28] The defendant concedes that it is a "merchant" within the meaning of the Uniform Commercial Code, and that the plaintiffs have alleged a sale of goods triggering the protections of the implied warranty of merchantibility. See generally Burris v. Itek Corp., 46 Ill.App.3d 350, 360 N.E.2d 1168 (3d Dist. 1977).

The implied warranty of merchantibility does not impose a general requirement that goods precisely fulfill the expectations of the buyer. Instead, it provides for a minimum level of quality--that the goods "are fit for ordinary purposes for which such goods are used." U.S.C. §2-314(2)(c). Automobiles are designed for driving, and therefore the question in this case is whether the GM vehicles at issue were fit for that

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[28]Breach of the implied warranty of fitness for a particular purpose is not involved here, because the plaintiff's complaint does not include any reference to a special use of the cars purchased by the plaintiffs beyond the ordinary purposes for which the cars were designed. See U.C.C. §2-315; H. Rep. No. 93-1107, supra, 1974 U.S. Code Cong. & Admin. News at 7707.

purpose. The Illinois Appellate Court has observed:

> Fitness for the ordinary purpose of driving implies that the vehicle should be in a safe condition and substantially free of defects. It should be obvious that any car without an adequate transmission and proepr brakes is not fit for the ordinary purpose of driving.

Overland Bond and Investment Corp. v. Howard, 9 Ill.App.3d 348, 292 N.E.2d 168, 172-73 (1st Dist. 1972). In Overland Bond the transmission fell out of the car on one occasion and the brakes failed on another, each time while the plaintiff was driving on an expressway. Since the car was clearly unsafe, the court concluded that the defendant had breached the implied warranty of merchantability.

The complaint here describes a less extreme situation. The plaintiffs allege that the substitution of THM 200 transmissions was "a material change" in the cars, and that these transmissions are "more expensive to maintain" and "less desirable to the purchasing public than THM 350 (M38) Transmission." Second Amended Complaint at 5. These statements fall short of alleging a breach of implied warranties, since they do not suggest that the cars were unfit for driving or below a minimally acceptable standard of quality.

III. DECEPTIVE WARRANTIES

The plaintiffs also contend that GM gave them deceptive warranties in violation of §110(c) of the Act, which provides:

> (1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commissions's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of Title 15 is not filed within such period (not exceeding 10 days) as may be specivied by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice requrie that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.
>
> (2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or

> which, in light of all the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

15 U.S.C. §2310(c).

The plaintiffs concede that this provision expressly authorizes suits only for equitable relief by the Attorney General or the Federal Trade Commission. They argue, however, that the statute impliedly creates a cause of action for damages by consumers who rely on deceptive representations in a warranty.[29]

As the Supreme Court has recently stated, "[t]he question of the exsitence of a statutory cause of action is, of course, one of statutory construction . . . . And as with any case involving the interpretation

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[29]The question whether the statute expressly provides a private cause of action for deceptive warranties is not as clear as the parties in this case seem to beleive. Section 110(d)(1) authorizes consumers to sue for failure to comply with "any obligation under this chapter". The avoidance of deceptive warranties is arguably a requirement of §110(c) of the Act, which would mean that consumers could sue suppliers of deceptive warranties.

of a statute, our analysis must begin with the language of the statute itself." Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979). The structure of the Act itself suggests that the set of rights and remedies

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However, the wording of §110(c) suggests that Congress did not intend the deceptive warranties provisions to be considered obligations "under" the statute. Subsection 1 of §110(c) authorizes the Attorney General or the Commission to sue to restrain:

> (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requiremen timposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter.

15 U.S.C. §2310(c)(1) (emphasis added). This provision suggests a distinction between the prohibition of deceptive warranties and violation of "any requirement" under the Act. The wording of the subsection indicates that deceptive warranties are not violations of "obligations under" the Act in suits by the Government, and are not covered by the private remedies section of the statute. See generally Schroeder, supra n. 4, at 22.

The defendant also criticizes the complaint because it fails to allege that the plaintiffs provided GM with a "reasonable opportunity to cure" the transmission problem as required by 15 U.S.C. §2310(e). The complaint does refer, however, to "defendant's failure or refusal to cure" the alleged defects in the transmissions. Complaint ¶12. At this early stage, before there has been any inquiry into the appropriateness of class representatives, this broad allegation is sufficient.

which Congress established should not include private damage suits against distributors of deceptive warranties. Unlike Cannon v. University of Chicago, 441 U.S. 677 (1979), the statutory provision at issue in this case does not contain a broad description of the conduct it is attempting to regulate followed by an entirely separate, and apparently incomplete, description of some of the remedies available; here the rights and remedies are substantially intertwined. Congress neither expressed nor implied a general policy of supplanting state law fraud remedies through a broad prohibition of deceptive warranties. Instead, §110(c) directs only the Attorney General or the Federal Trade Commission to bring lawsuits--and even they are limited to actions to "restrain" deceptive warranties, and not suits for money damages.

Inferring a private cause of action for deceptive warranties would also interfere with the policies suggested by other provisions of the Act. One of the purposes

of the statute as a whole is to "prevent deception" in the marketing of consumer products. 15 U.S.C. §2302. However, the Act attempts to accomplish this goal without unduly discouraging or confusing businesses which choose to provide written warranties. To accommodate the needs of consumers and warrantors, the Act creates a regulatory scheme consisting largely of rules issued by the Federal Trade Commission after having provided all concerned an opportunity to comment.[30] Commission regulations attempt to supply a relatively clear set of guidelines so that warrantors will have some notion of the practices which the Act forbids. To assure compliance with these guidelines, the Act provides a broad set of remedies for consumers who are "damaged" by warrantors who fail

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[30]For an example of the extensive exchange of information between the Commission and various warrantors and consumer groups, see Antitrust & Trade Reg. Rep. (BNA), supra n. 12, at F-1--G-4.

to comply with the Act, with FTC regulations,[31] or with the terms of a written warranty. 15 U.S.C. §2310(d)(1). It would upset the structure of this statutory and regulatory scheme if a warrantor who carefully complied with the Act and the Commission guidelines could nevertheless be slapped with a large consumer damage action under the deceptive warranty provisions of the statute. See Touche Ross & Co., supra, 442 U.S. at 570-74. See generally Cort v. Ash, 422 U.S. 66, 78 (1975).

Congress also intended that the deceptive warranty section of the Magnuson-Moss Act be read against the background of the Federal Trade Commission Act,[32]

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[31]Section 110(d)(1) does not explicitly authorize private suits for breaches of Commission regulations promulgated under the Act, but the statutory scheme strongly suggests that the reference to private suits for failure to comply with "any obligation under this chapter" includes the regulations. See Schroeder, supra n. 4, at 24-25.

[32]In fact, Title II of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act was a broad revision of the powers of the Commission to regulate deceptive practices. See Joint Explanatory Statement of the Committee of Conference, supra, 1974 (U.S. Code Cong. & Admin. News at 7761-7755 [sic].

15 U.S.C. §40 et seq. Indeed, the subsection authorizing the Commission to restrain distribution of deceptive warranties explicitly refers to the Federal Trade Commission Act, and the Commission has incorporated regulations it had already adopted under the latter statute as its initial approach to deceptive warranty practices. 16 C.F.R. §239 (1980). The Trade Commission Act gives the FTC broad power to prohibit "unfair or deceptive acts or practices." 15 U.S.C. §45. Though at the time Congress was considering the Magnuson-Moss Act the issue was far from clear, the Commission took the position that it already had the power to regulate deceptive warranties and advertisements, and in the past several years that position has proved correct.[33] The deceptive warranty section of the Magnuson-Moss Act is, therefore, largely an effort by the legislative draftsmen to make sure that the statute did not conflict with earlier statues and to clarify the fact that the Commission

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[33]See Hearings Before the Subcommittee on Commerce & Finance, supra n. 15, at 87 (statement of Mr. Engman). See generally Warner-Lambert Co. v. F.T.C., 562 F.2d 849, cert. denied 435 U.S. 950 (1977).

had the power to bring suits for injunctive relief to deter at least one category of deceptive acts. The subsection is, in a sense, simply an unnecessary amendment to the Trade Commission Act.

Courts have consistently held that the Federal Trade Commission Act, as amended, does not impliedly create a private cause of action for unfair or deceptive practices: For example, in Holloway v. Bristol-Meyers Corp., 485 F.2d 986 (D.C. Cir. 1973), the court of appeals contrasted suits by consumers injured by deceptive practices with private antitrust suits explicitly authorized by the Clayton Act. The court observed that the "focus of the Trade Commission Act was a highly specialized administrative body to which Congress delegated a wide range of visitorial powers . . . ." Id. at 991 Judge Levelthan, writing for a unanimous panel, pointed out: "Congress . . . felt the agency's expertise in making concrete the proscriptions of the 1914 Act against 'unfair methods of competition' rendered the FTC particularly well suited to the responsibility of giving life to

the broad standard of 'deceptiveness' as applied to advertising." Id. at 995-96. He distinguished other cases in which courts, in an effort to accomplish the purposes of a statute, had inferred private rights of action:

> We are considerin an Act in which ends and means, the social ends to be fostered and the administrative means of achieving those objectives, are inseparably interwoven into a unified and comprehensive statutory fabric. Both are the product of a legislative balance which took into account not only consumer protection but also interests of the business affected, with particular concern for tempered enforcement, the orderly development of commercial standards, and freedom from multiplicious litigation.

Id. at 997. The court concluded that a "fair reading of the statute and its legislative history evidences a plain intent by Congress to make the administrative program for enforcing the Federal Trade Commission Act an exclusive one". Id. at 1002.

Similar reasoning suggests that the deceptive warranty provisions of the Magnuson-Moss Act do not imply that there should be a private cause of action against suppliers of deceptive warranties. The term "deceptive" is ambiguous, and is best defined initially

by the Act.[34] In addition, the conduct which Congress was attempting to regulate and the methods it authorized are "inseparably interwined" in the statute. Id. at 997. Inferring a new cause of action in this context would disrupt the statutory framework and needlessly intrude into state law and administrative discretion.[35]

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[34]See H. Rep. 93-1107, supra, 1974 U.S. Code Cong. & Admin. News at 7727.

[35]However, the plaintiffs may not be entirely without a remedy under the explicit terms of the statute itself. Subsection 110(d)(1) authorizes private suits by consumers who are "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter. . . ." 15 U.S.C. §110(d)(1). One of the obligations imposed on warrantors under the Act is that they "fully and conspicuously disclose in simple and readily understood language the terms and conditions" of written warranties. 15 U.S.C. §2302(a). The Commission has interpreted this section to require, among other things, that a written warranty include a "clear description and identification of products, or parts, or characteristics, or components or properties covered by and, where necessary for clarification, excluded from the written warranty." 16 C.F.R. §701.3(a)(2) (1980). If GM warranted the quality of its transmissions without disclosing that its "characteristics" or "properties" were different than thte consumer reasonably expected, such an omission might violate this regulation. However, except for a passing citation in the plaintiffs' memoranda, the parties have not raised this issue, and the complaint is not directed at this provision.

Since Count II of the plaintiffs' second amended complaint is based entirely on the deceptive warranty section of the Act, and since it does not distinguish between deception in written warranties within the definition of §101(6) and other deceptive representations, this court concludes that Count II must be dismissed.

For the reasons stated above, the defendant's motion to dismiss is denied as to Count I and granted as to Count II.

JAMES B. MORAN

James B. Moran, Judge
UNITED STATES
DISTRICT COURT

October 1, 1980.

Opposition

Supreme Court, U.S.
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No. 81-1707

In the

Supreme Court of the United States

MARCH TERM, 1982

ARLIE GLEN SKELTON, JR., et al.,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CHAS. P. YOUNG CHICAGO, INC.

QUESTION PRESENTED

Title I of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 *et seq.* (1975), imposes federal disclosure obligations on suppliers who offer "written warranties" in connection with the sale of consumer goods. The "Definitions" section of the Act, § 101, defines fifteen terms "[f]or the purposes of this title," including "written warranty." The question presented is:

> Whether the definition of "written warranty" in § 101(6) of the Magnuson-Moss Warranty Act controls § 110(d), which permits private actions for breach of a "written warranty" under the Act.

PARTIES TO THE PROCEEDINGS

Petitioners were appellees below and purport to represent a nationwide class of purchasers of certain General Motors automobiles that were manufactured from 1976 through 1979. Respondent, General Motors Corporation, was appellant below. All U.S. and Canadian subsidiaries of respondent are wholly-owned, with the exception of Motor Enterprises, Inc., which is partly owned by the U.S. Small Business Administration.

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In the

Supreme Court of the United States

MARCH TERM, 1982

ARLIE GLEN SKELTON, JR., et al.,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, General Motors Corporation, respectfully prays that the Court deny the petition for a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered on September 28, 1981.

STATEMENT OF THE CASE

This case purports to be an action for breach of a written warranty under § 110(d) of the Magnuson-Moss Warranty Act, brought on behalf of a nationwide class of purchasers of General Motors automobiles. Section 110(d) provides in pertinent part that a consumer "who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation...under a written warranty...may bring suit for damages and other legal and equitable relief...in an appropriate district court of the United States,..." (15 U.S.C. § 2310(d))

Section 101, the "Definitions" section of the Act, specifies that, "For the purposes of this title:. . .

> "(6) The term 'written warranty' means—
>
> > "(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specific period of time, or
> >
> > "(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,
>
> "which written affirmation, promise or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product." (15 U.S.C. § 2301(6))

The term "written warranty" is used on over forty occasions throughout the Act, being crucial to the statute's primary objective of providing adequate disclosure and enforcement of the formal written warranties extended by most manufacturers on their consumer goods. As an example, § 102 specifies that suppliers who extend a "written warranty" must "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." (15 U.S.C. § 2302(a)) Section 103 provides that the supplier must further disclose whether the "written warranty" is intended to be a "full" or only a "limited" warranty, while § 104 sets out the requirements that must be met for a "written warranty" to carry the "full" designation. (15 U.S.C. §§ 2303, 2304) Section 108 prohibits a complete

disclaimer of state implied warranties on a "written warranty," although some restrictions on such warranties are permitted. (15 U.S.C. § 2308)

Petitioners' complaint made no claim that General Motors had breached the formal written warranty which it provides to purchasers of its new cars. Rather, the gravamen of their complaint was that respondent allegedly represented in advertising and sales literature that certain purchasers of GM automobiles would receive "THM 350 transmissions or transmissions of similar quality and performance," but that respondent allegedly substituted "THM 200 transmissions." (App. 2) Respondent moved to dismiss on the ground that such advertising and sales materials did not constitute "written warranties" within the definition of the Act and therefore were not actionable under the Act.

The district court agreed that advertising and sales materials do not come within the § 101(6) definition. Nevertheless, it denied respondent's motion to dismiss on the ground that the Act should reach "beyond the four corners of the formal warranty" to "any written representations made in connection with the sale of the same product which is covered by a formal warranty...." (App. 56) The district court certified its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The court of appeals reversed the district court in a 2-1 decision. Writing a careful 24-page analysis of the statutory language and legislative purpose, the majority held that the term "written warranty" in § 110(d) must be read "in accordance with the definition of 'written warranty' provided by Congress in § 101(6)" of the Act. (App. 24) The majority emphasized that, "The term 'written warranty' serves a central function in the Act of identifying the particular representations that are subject to the Act's disclosure and content requirements. Because of the function it serves, it is important that the term have a single, precise meaning." (App. 23) The majority concluded that this single, precise meaning must be found in § 101(6), where, "by the very act

of including a definition in the statute, the statute's draftsmen have made a considered determination of the appropriate meaning of that term for the purposes of the particular statutory scheme they have created." (App. 11-12, n.9)

The majority further concluded that its reading of the statute was confirmed by the relevant legislative history. (App. 11-18) It specifically found that "[n]one of the legislative history offered by plaintiffs in this record provides the clear evidence of Congressional intent necessary to overcome the 'familiar principle governing the interpretation of statutes . . . that if a statutory definition of a word is given, that definition must prevail, regardless of what other meaning may be attributable to the word.' " (Citation omitted; App. 11)

On December 11, 1981, the court of appeals denied plaintiffs' petition for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The lone issue of statutory construction raised by petitioners fails to meet this Court's standards for granting certiorari. The Seventh Circuit's ruling does not conflict with the decision of any other circuit. Nor does the straightforward reading of the Magnuson-Moss Warranty Act by the court of appeals present any important, or even consequential, question of federal law that should be settled by this Court.

Petitioners have attempted to confuse the significance of the Magnuson-Moss Warranty Act with the insignificance of the narrow question of statutory interpretation that was decided below. Since Congress carefully defined the term "written warranty" in the opening section of the Act and specified that the definition should apply throughout the statute, the court of appeals correctly held that the definition controlled all subsequent sections of the Act, including the provision allowing private actions for breach of "written warranty." As will be shown, this holding is compelled by

sound and established rules of statutory construction and is fully consistent with the purpose and legislative history of the Act. Accordingly, there is no issue meriting review by this Court.

First, certiorari is not justified since the court of appeals merely applied the well settled maxim of statutory construction that, if Congress prescribes a statutory definition of a word, that definition must be followed throughout the statute. The court rightly rejected petitioners' anomalous suggestion that the term "written warranty" should be deemed to have been used "in many different ways throughout the various sections of the Act." (Pet. 35)

Second, the court of appeals found ample support for its plain reading of the statutory definition in the legislative history and purpose of the Act. Observing that Congress' purpose in enacting the statute was to make formal warranty documents more understandable to the average consumer, the court soundly reasoned that this purpose was best served by a consistent application of the congressional definition that fostered ready compliance by suppliers. The court further reasoned that a consistent application of the term "written warranty" as Congress had written it would preserve all of the consumer rights contemplated by the statute.

Third, the court of appeals correctly concluded that there were no ambiguities in the statutory language which justified displacing the congressional definition of "written warranty" with a different, judicially prescribed meaning. None of the three purported "ambiguities" cited by petitioners poses any issue meriting consideration by this Court since, as the Seventh Circuit found, each is ephemeral when considered in light of the Act's purpose, language and overall structure.

Finally, the Seventh Circuit squarely rejected petitioners' contention that prior decisions within that circuit required

displacing the congressional definition of "written warranty." Not only did the majority below find no substance in petitioners' claim, but the court of appeals denied a petition for rehearing *en banc* in which the alleged conflict with prior decisions was pressed.

A. There Is No Issue Meriting Certiorari Since The Court Below Merely Applied Congress' Explicit "Written Warranty" Definition.

The decision by the court of appeals to apply Congress' explicit statutory definition of "written warranty" consistently throughout the Magnuson-Moss Act raises no issue justifying certiorari. In the very first section of the Act, Congress spelled out the definitions of fifteen key terms, including "written warranty." It expressly provided that each of those definitions should apply "[f]or the purposes of this title." Settled principles of statutory construction support the court's conclusion that the congressional definition fixes the meaning of that term in later sections, including the provision for a private action for breach of written warranty in §110(d).

Petitioners themselves recognize that the Magnuson-Moss Act was the result of ten years of legislative effort. (Pet. 43) During this period, Congress carefully crafted the definitions which were ultimately enacted in § 101. As this Court remarked in an analogous context, "Congress' choice of precise language in this complex statute cannot be glossed over. . . ." *Quern* v. *Mandley*, 436 U.S. 725, 741 (1978). A statutory definition declaring what a term "means" excludes any meaning that is not stated. *Colautti* v. *Franklin*, 439 U.S. 379, 392 and n.10 (1979).

Petitioners not only urge this Court to reject the congressional definition, but they frankly acknowledge that their reading of the statute would result in "many different" meanings of "written warranty" within the Act. (Pet. 35)

The court of appeals rightly refused to accept such an unprecedented argument in light of the long-recognized rule that:

> " '[W]here the same word or phrase is used in different parts of a statute, it will be presumed, in the absence of anything clearly indicating a contrary intent, that the word or phrase is used in the same sense throughout. Under circumstances giving application to this rule, there is a corollary that, where the meaning of the word or phrase in one instance is clear, this meaning will be attached to it elsewhere.' " (App. 22; quoting *United States* v. *Gertz*, 249 F.2d 662, 665 (9th Cir. 1957)[1]

These principles are especially applicable in this case, where Congress expressly and plainly stated what meaning should attach to particular terms "[f]or the purposes of" the entire statute. Following the congressional mandate under these circumstances can hardly be criticized as "blind adherence" to the statute. (Pet. 39) Indeed, this Court has consistently ruled that the courts must "apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great Northern Ry.*, 343 U.S. 562, 575 (1952).

None of the cases cited by petitioners comes close to suggesting that a defined term should not be given consistent application throughout a statute. In fact, none of their cases even involved a controlling statutory definition, let alone one as carefully drafted as § 101(6). *Compare, Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970); *Federal Trade Comm'n* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Federal Trade Comm'n* v. *Sun Oil Co.*, 371 U.S. 505

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[1] *See also, Hotel Equities Corp.* v. *CIR*, 546 F.2d 725 (7th Cir. 1976), rejecting the IRS' argument that a statutory definition in the Tax Code could be ignored: "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." (*Id.* at 728)

(1963); *Richards* v. *United States*, 369 U.S. 1 (1962). (Pet. 40, 42)[2]

B. The Legislative Purpose And History Fully Support Application Of Congress' Own Definition of "Written Warranty".

Contrary to petitioners' argument (Pet. 25), the "broad history and purposes" of the statute are fully carried out by the Seventh Circuit's decision to apply the definition of "written warranty" which Congress itself has fashioned. Accordingly, there is no opposition between Congress' objective and the decision below which would justify intervention by this Court. As the court soundly observed:

> "[B]y the very act of including a definition in the statute, the statute's draftsmen have made a considered determination of the appropriate meaning of that term for the purposes of the particular statutory scheme they have created." (App. 11-12, n.9)

In terms of the "particular statutory scheme" of the Magnuson-Moss Act, petitioners concede that, "The warranty and quality information, often found in limited and confusing 'filigree border' booklets, was the central object of Congress' requirements for minimum standards o[f] disclosure and full and complete information." (Pet. 24) Congress met this perceived problem by first defining "written warranty" to cover such "filigree border" documents and then imposing detailed disclosure and compliance requirements regarding such warranties.[3] Since Congress' "intent will be effectuated by the natural reading [given] to the

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[2] Petitioners ultimately reveal that the statutory language is dispositive against them when they ask this Court to accomplish what petitioners claim were "Congress' true purpose" by correcting what they argue are "mistakes in the Act,..." (Pet. 47)

[3] Petitioners also assert that an objective of the Act was "to prevent manufacturers from using a limited express warranty as a device to rob consumers of the warranty protection they would normally have

relevant statutory provisions," that natural reading should be followed. *Quern* v. *Mandley, supra,* 436 U.S. at 747.

Instead of carrying out the true objectives of the statute as enacted, what petitioners actually request is the implementation of prior bills which "were never reported out of committee." (Pet. 22) They seek creation under the Magnuson-Moss Warranty Act of a federal cause of action for breach of state law express warranties. After carefully analyzing the relevant bills and committee reports, however, the court concluded that "there is simply no substantial evidence in the legislative history that Congress intended to create a broad federal cause of action for breach of written express warranties." (App. 18; *see* H.R. Rep. No. 93-1107, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News. 7702, 7703; Conf. Rep. No. 93-1408, 93d Cong., 2d Sess., Joint Explanatory Statement of the Committee of Conference, *reprinted* in 1974 U.S. Code Cong. & Ad. News, 7755, 7758, 7759)

In the final analysis, the court of appeals recognized that departure from the clear definitional standard adopted by Congress would create confusion and prospective litigation in an area where Congress sought clarity and precise legal rules. The court stressed that, "the need for a clearly circumscribed definition in the statutory scheme before us is apparent, since, to comply with the Act's obligations, manufacturers and suppliers must know in advance exactly which representations are subject to those obligations." (App. 10, n.7) This objective would be undermined by petitioners' suggestion that the formal written warranties encompassed by the statutory definition should be deemed to "inferentially incorporate" other unspecified documents which then also would become subject to the Act's provisions. (Pet. 34)

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under state law." (Pet. 23) As noted at pp. 2-3, *supra,* § 108 accomplished this objective by prohibiting a complete disclaimer of state implied warranties in a written warranty, as defined in the Act.

C. There Are No Ambiguities In The Act That Justify Review By This Court of Congress' "Written Warranty" Definition.

Petitioners attempt here, as they did below, to avoid the congressional definition of "written warranty" in § 101(6) by contending that supposed "ambiguities" would arise if that definition were applied to other sections of the Act. Importantly, petitioners make no claim that any of these purported "ambiguities" would arise from application of the "written warranty" definition to the provision for private actions in § 110(d), which is the only section relevant to this case. Beyond this, the asserted "ambiguities" in other sections were correctly held by the Seventh Circuit's decision to be illusory in light of the Act's purpose, language and structure and afford no basis for certiorari.

The court first disposed of the purported "ambiguity" in § 103(b), which provides that the Act's disclosure requirements "shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations" (15 U.S.C. § 2303(b))—*e.g.*, claims of "satisfaction guaranteed or your money back." Just as petitioners do here (Pet. 38-9), they had urged that this provision would be "unnecessary" if the § 101(6) definition were intended to apply thoughout the Act, presumably because such generalized representations could never fall within the § 101(6) definition. But the court of appeals correctly observed:

> "We cannot accept this supposition, however, because it is possible to construe these generalized representations to fit within the § 101(6) definition in some cases. For example, a written statement that 'your money will be refunded if you are not completely satisfied' might be deemed to constitute an 'undertaking in writing in connection with the sale by a supplier of a consumer product to refund . . . in the event that such product fails to meet the specifications set forth in the undertaking,' *i.e.*,

> complete satisfaction.... Section 103(b) may quite plausibly have been included in the Act precisely to foreclose such interpretations." (App. 20)

Contrary to petitioners' suggestion, the majority did not have to "strain" to reach this result. (Pet. 39) As the court noted, the Federal Trade Commission, which is charged by Congress with interpretation and enforcement responsibilities under the statute, had already reached the same conclusion:

> "In its regulations, the FTC describes § 103(b) as creating an 'exemption' from the requirements of §§ 102-104. 16 C.F.R. § 700.5(b) (1980). This description strongly suggests that the FTC also perceives that at least some of the generalized statements exempted by § 103(b) might otherwise fall within the § 101(6) definition, since the same regulation unambiguously states that the duties and liabilities of the Act are imposed only on those suppliers who offer 'written warranties' as defined in § 101(6). *See* 16 C.F.R. § 700.3(a) (1980)." (App. 20, n. 18)

The court also had no difficulty disposing of petitioners' asserted "ambiguity" in § 110(c)(2)(B), which provides that a "deceptive warranty" includes a "written warranty created by the use of such terms as 'guaranty' or 'warranty,' if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual." (15 U.S.C. § 2310(c)(2)(B)) As here, petitioners argued below that this section "apparently" means that "a written warranty can be 'created' by the use or misuse of the words 'guaranty' or 'warranty' even if the document using the terms does not include representations which constitute warranties under § 101(6)." (Pet. 37)

The majority rightly concluded that this provision could easily be read in a way that permits Congress' "written warranty" definition to apply consistently throughout the statute. The term "deceptive warranty" was intended to

mean a written warranty as defined in § 101(6), which contains such terms as "guaranty" or "warranty," if the warranty's terms and conditions "so limit its scope and application as to deceive a reasonable individual." (App. 21) The majority found this construction confirmed by the commentators (C. Reitz, Consumer Protection Under the Magnuson-Moss Warranty Act 77 (1978)), and noted that petitioners' contrary interpretation was totally "without support in the legislative history." (App. 21)

Finally, the court of appeals correctly reasoned that § 102 was not at odds with the § 101(6) definition. (Pet. 35-6) Section 102 authorizes the Federal Trade Commission to promulgate rules requiring inclusion in the written warranty of an explanation of the rights of the consumer, including such items as a "brief, general description of the legal remedies available to the consumer." (15 U.S.C. § 2302) The court found nothing incompatible between this and the congressional definition of "written warranty":

> "The text of a 'written warranty' must, in the nature of things, be written *on* something. And, to this extent, a written warranty as defined in § 101(6) might be described as a written document. But there is nothing in the scheme of the statute to suggest that the Act was intended to apply to any promises, affirmations or undertakings other than those defined as written warranties in § 101(6).... Moreover, we are constrained by sensible rules of statutory construction to interpret the phrase 'written warranty' in § 102, as in the other sections of the statute, to be consistent with the clear meaning given to it by § 101(6)." (App. 22; emphasis in original)

In short, the court of appeals held that the three alleged ambiguities "are not sufficiently real or substantial to warrant rejection of the definition of 'written warranty' provided by Congress in the Act." (App. 19) Re-emphazing the importance of adhering to the congressional definition throughout the statute, the Court concluded:

"The term 'written warranty' serves a central function in the Act of identifying the particular representations that are subject to the Act's disclosure and content requirements. Because of the function it serves, it is important that the term have a single, precise meaning. The § 101(6) definition provides that unambiguous meaning, and that definition is used (all things considered) with commendable aptness by the draftsmen in the forty-odd appearances of the term 'written warranty' in every section of the Act. We cannot agree that syntactical slips such as the use of the preposition 'in' in § 102, create ambiguities in the statutory scheme of sufficient weight to justify disregarding the meticulously worded definition of 'written warranty' in § 101(6) in favor of an unidentified 'document,' or 'pile of written documents,' as urged by the district court. *See* 500 F. Supp. at 1190." (App. 23-24)

D. There Is No Conflicting Precedent On The Issue Decided By The Court Of Appeals.

Petitioners have cited no case from any other circuit in which the Magnuson-Moss Act issue raised here was even considered, let alone decided inconsistently with the holding below. Lacking any conflict between circuits to merit consideration of certiorari, petitioners erroneously claim that the holding is inconsistent with earlier rulings by the Seventh Circuit in *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). (Pet. 27-32) Petitioners unsuccessfully advanced this same argument both to the panel which rendered the decision and to the entire Seventh Circuit in a petition for *en banc* rehearing. On both occasions, the court properly rejected the argument as unfounded, thereby disposing of petitioners' claim that there is some conflict within the Seventh Circuit.[4]

[4] Even the district court dismissed petitioners' claim by observing: "This case is related in certain respects to the much publicized 'engine

Thus, when the supposed "conflicting" precedent of the *Engine Interchange Litigation* was presented to the court of appeals, the majority rejected petitioners' argument, stating:

> "That litigation has been before this court twice on questions concerning, *first*, the district court's approval of a subclass settlement, *In re General Motors Corp. Engines Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979), and, *second*, the sufficiency of a notice which detailed an offer of a settlement to individual subclass members, *Oswald* v. *McGarr*, 620 F.2d 1190 (7th Cir. 1980). Nothing in our opinions or in the district court's orders in that case, however, directly addresses the issue before us here—namely, whether a warranty of description of an automobile component is actionable as a 'written warranty' under § 110(d) of Magnuson-Moss." (App. 3, n. 1)[5]

Likewise, petitioners pressed the supposed "conflict" between the majority opinion and prior Seventh Circuit decisions as justification for rehearing *en banc*. Attempting to bring their case within Seventh Circuit Rule 16(b), petitioners urged that reconsideration was appropriate and necessary because, "[A] majority of judges addressing the issue in this Circuit appear to disagree with the two judges of the Majority Opinion." (Petition for Rehearing En Banc, 4) The petition for rehearing was denied, disposing of petitioners' claim that the Seventh Circuit is itself in a state of contradiction or

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interchange' litigation," but "[t]he questions here presented were not considered there." (App. 28, n. 1)

[5] In the course of its opinion, the majority specifically addressed the language from footnote 44 of its earlier decision (quoted at Pet. 32), observing: "This statement, which does not purport to be dispositive of anything, is not part of our holding in that case." (App. 3, n. 1)

Even Circuit Judge Wood, who had authored footnote 44 and whose dissenting remarks below are the touchstone of petitioners' position here (Pet. 44, 46), nowhere suggested in his dissent that the court had already decided the issue before it in this case.

inconsistency on the issues correctly decided by the majority below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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